

# FEDERAL PUBLIC DEFENDER NEWSLETTER

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## **RECENT SUPREME COURT DECISIONS**

***Florida v. White***, C U.S. C, 119 S.Ct. 1555 (1999).

On three occasions, police officers observed White using his car to deliver cocaine. Based on these observations, the officers developed probable cause that the car was subject to forfeiture under Florida law. Several months later, White was arrested at his job for an unrelated drug offense. The arresting officers, without obtaining a search warrant, seized White's car that was parked in a parking lot because they believed that the car was forfeitable based on the prior drug offenses that they witnessed. During an inventory search of the car, crack cocaine was found and White was also charged with possession of this controlled substance.

White sought suppression of the evidence and the trial court denied the motion. The Florida Court of Appeals affirmed, but the Florida Supreme Court reversed and found that absent exigent circumstances, a warrantless seizure of the car violated the 4<sup>th</sup> Amendment. The United States Supreme Court reversed and found that the officers had probable cause to believe that the vehicle was contraband under Florida law. Because the contraband was easily moveable, under the

4<sup>th</sup> Amendment, law enforcement officers were afforded greater latitude in seizing a car found in a public place. Because the car was seized from a parking lot, the warrantless seizure did not involve an invasion of White's privacy and a warrant was not required.

***Wilson v. Layne***, C U.S. C, 119 S.Ct. 1692 (1999).

Arrest warrants issued for Dominic Wilson for probation violations but they did not expressly permit the media's presence or assistance during their execution. Dominic was the son of the petitioners Geraldine and Charles Wilson. To execute the warrants, law enforcement officers forcibly entered the Wilsons' home and roused them while looking for Dominic. The officers were accompanied by a *Washington Post* reporter and photographer who recorded the events. After completing a protective sweep of the house, the officers learned that Dominic was not present and they departed.

Petitioners sued the officers in their personal capacities for money damages under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) and ' 1983. Petitioners argued that their 4<sup>th</sup> Amendment rights were violated when the officers brought the media to observe and record the execution of the arrest warrants. The district court denied the government's motion for summary judgment which was predicated on the defense of qualified immunity. An interlocutory appeal followed and a divided panel of the court of appeals reversed and held that the government was entitled to assert the defense of qualified immunity.

Both *Bivens* and ' 1983 allow plaintiffs to seek money damages from government officials who have violated their 4<sup>th</sup> Amendment rights. However, government officials are entitled to assert the defense of qualified immunity where their conduct does not violate clearly established statutory or constitutional rights about which a reasonable person would have known.

Thus, in order to evaluate a claim of qualified immunity, a court must first determine whether the plaintiff has alleged a deprivation of a constitutional right.

If a deprivation is proven, the court must then determine whether the right was clearly established at the time of the alleged violation.

The Court found that the arrest warrant entitled the agents to enter the house and arrest Dominic. However, the warrant did not entitle the officers to bring either reporters or photographers. The presence of the media inside the home was not related to the apprehension of Dominic. Therefore, the Court found that the 4<sup>th</sup> Amendment is violated when officers invite the media or other third parties into the location where a warrant is to be executed when the presence of the third parties is not in aid of the execution of the warrant. However, the Court found that when the warrant in this case was executed, it was reasonable for an agent to believe that inviting media observers to witness its execution was lawful. Therefore, the court of appeals decision on the application of qualified immunity was affirmed.

***Hanlon v. Berger*, C U.S. C, 119 S.Ct. 1706 (1999).**

The Bergers live on a 75,000 acre ranch in Montana that was the object of a federal search warrant.

When the warrant was being executed, government agents were accompanied by photographers and reporters from CNN. The Bergers commenced a *Bivens* action against the government agents for damages. The Supreme Court held that the Bergers set forth a Fourth Amendment violation as held in *Wilson v. Layne, supra*. However, the Court found that the agents and the Assistant U.S. Attorneys were entitled to the defense of qualified immunity.

***O'Sullivan v. Boerckel*, C U.S. C, 119 S. Ct. 1728 (1999).**

Boerckel was convicted in state court of rape, burglary, and aggravated battery. A direct appeal was perfected in the Illinois Appeals Court in which eight issues were raised. Boerckel's conviction was affirmed and he sought discretionary review in the Illinois Supreme Court by filing a Petition For Leave to Appeal in which only three issues were raised. The Illinois Supreme Court denied Boerckel's petition and he filed a ' 2254 petition in which six grounds for relief were raised.

The district court found that Boerckel

procedurally defaulted three of the claims by failing to include them in his petition to the Illinois Supreme Court.

Boerckel argued that his procedural default should be excused because he fell within the fundamental miscarriage of justice exception to the procedural default rule because he was actually innocent of the crimes for which he was convicted. The district court rejected this argument and dismissed the petition.

The 7<sup>th</sup> Circuit reversed after finding that Boerckel did not procedurally default the three claims in his *habeas* petition by failing to raise them in his petition to the Illinois Supreme Court. The U.S. Supreme Court reversed the judgment of the 7<sup>th</sup> Circuit and found that a state prisoner must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement. The Court justified this conclusion because A[c]omity . . . dictates that Boerckel use the State's established appellate review procedure before he presents his claims to a federal court. 28 U.S.C. ' 2254(c) requires state prisoners to give state courts a fair opportunity to act on their claims.

Even though in his discretionary appeal to the Illinois Supreme Court, Boerckel had no right to review, he did have a right to raise his claims.

***Lilly v. Virginia*, C U.S.C, 119 S.Ct. 1887 (1999).**

Ben Lilly (Ben) and two co-defendants were arrested for a crime spree that included burglary, robbery and murder. After their arrests, the three men were questioned separately. Ben did not mention the murder but he did state that his co-defendants forced him to participate in the robberies. Mark Lilly (Mark), Ben's brother, gave a tape-recorded statement in which he stated that Ben masterminded the robberies and was the killer.

Ben was charged with murder and tried separately from his co-defendants. At Ben's trial, the State called Mark as a witness but he invoked his right against self-incrimination. After the invocation, the State offered Mark's post-arrest statements as declarations of an unavailable witness against penal interests. The trial court, over Ben's objection, admitted the statements and he was convicted and sentenced to death. Ben's convictions and sentence were affirmed in the state court and the Supreme Court accepted the case for direct review.

The veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when: (1) Athe evidence falls within a firmly rooted hearsay exception or (2) it contains Aparticularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statements reliability.®

A hearsay exception is firmly rooted if, in light of long standing judicial and legislative experience, it rests on such a solid foundation that admission of virtually any evidence within it comports with the substance of the constitutional protection. A declaration against penal interest exception to the hearsay rule is founded on the broad assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made. There are three situations in which statements against penal interests arise at trial: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant.

The Court found that the statement at issue in this case fits into the third category. However, the Court concluded that the third category of statements is inherently unreliable. Thus, the accomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in the Court's Confrontation Clause jurisprudence. Therefore, the Supreme Court rejected the state court's conclusions that the statements were admissible under a firmly rooted hearsay exception.

Moreover, statements that fall within the third category are presumptively unreliable. To be admissible under the Confrontation Clause, we held, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. The fact that Mark was informed of his *Miranda* rights did not render the statement trustworthy. Instead, the statements were unreliable and inadmissible because they were made: while Mark was in custody for the robbery; in response to leading questions; without being subjected to cross-examination; and while Mark was under the influence of alcohol.

***Chicago v. Morales***, 512 U.S. 137, 119 S.Ct. 1849 (1999).

Chicago City Council enacted the Gang Congregation Ordinance which prohibits a criminal street gang member from loitering with one another or with other persons in any public place. The ordinance was in response to hearings that were conducted in which city council found that an increase in street gang activity was responsible for the city's rising crime rate.

The elements of the crime were: (1) the police officer must reasonably believe that at least one of the two or more persons present in a public place is a criminal street gang member; (2) the persons must be loitering, which the ordinance defined as remaining in any public place with no apparent purpose; (3) the

officer must order all of the persons to disperse and remove themselves from the area; and (4) a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance.

After the ordinance was adopted, the Chicago Police Department promulgated guidelines to ensure that the ordinance was not enforced in an arbitrary or discriminatory manner. Morales was convicted of violating the ordinance but his conviction was reversed by the Illinois Court of Appeals and the Illinois Supreme Court affirmed. The United States Supreme Court found that the ordinance was unconstitutionally vague and affirmed the Illinois Supreme Court.

Imprecise laws can be attacked on their face under two doctrines: (1) overbreadth- permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep. (2) Vagueness - statute fails to establish standards for police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.

The Court found that the ordinance did not have a sufficiently substantial impact on conduct protected by the 1<sup>st</sup> Amendment to render it unconstitutional because it does not prohibit speech. Moreover, the ordinance did not impair the 1<sup>st</sup> Amendment right of association.

However, the freedom to loiter for innocent purposes is part of the liberty protected by the Due Process Clause of the 14<sup>th</sup> Amendment. Thus, the Court found that the ordinance was subject to attack on vagueness grounds. Vagueness may invalidate a criminal law for two reasons: (1) it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; and (2) it may authorize and even encourage arbitrary and discriminatory enforcement.

A law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. Even though the term loiter has a common and accepted meaning, the definition of loiter in the Chicago ordinance (to remain in any one place with no apparent purpose)--does not. The Court found that it was difficult to imagine how any citizen of Chicago, standing in a public place with a group of people, would know if he or she had an apparent purpose. The Court found that Chicago could not have meant to criminalize each instance in which a citizen stands in public with a gang member. Thus, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of loitering but rather about what loitering is covered by the ordinance and what is not. No one may be required, at peril of life, liberty, or property to

speculate as to the meaning of penal statutes.

The Court found that the ordinance is vague in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Finally, the Court concluded that the ordinance did not provide sufficiently specific limits on the enforcement discretion of the police to meet constitutional standards under definiteness and clarity.

*Neder v. United States*, 506 U.S. 154, 119 S.Ct. 1229 (1999).

Neder was convicted of mail, wire, bank, and tax fraud and both parties to the appeal agreed that the district court erred in refusing to submit the issue of materiality on the tax charges to the jury. The 11<sup>th</sup> Circuit affirmed Neder's conviction and held that the district court erred, under the intervening decision of *United States v. Gaudin*, 515 U.S. 506 (1995), by failing to submit the issue of materiality of the tax charges to the jury. However, the 11<sup>th</sup> Circuit concluded that the error was harmless because materiality was not in dispute. Moreover, the 11<sup>th</sup> Circuit found that materiality was not an element of the mail, wire and bank fraud statutes.

The Supreme Court found that most constitutional errors are subject to a harmless error analysis. If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any constitutional errors that may have occurred are subject to a harmless error analysis. If the error is structural, the conviction is subject to automatic reversal. However, there is a limited class of cases where the error will be deemed to be structural (e.g. - complete denial of counsel; biased trial judge; racial discrimination in selection of a grand jury; denial of self-representation at trial; denial of public trial; and defective reasonable doubt instruction).

An instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair. Instead, the omission of an element from the instruction will result in an application of the harmless error analysis found in *Chapman v. California*, 386 U.S. 18 (1967). An error is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. In this case, the Court found that no jury could reasonably find that Neder's failure to report substantial amounts of income on his tax returns was not a material matter. Therefore, the Court found that the error was harmless.

The Court further found that the materiality of the falsehood is an element of a scheme or artifice to defraud under the federal mail, wire, and bank fraud

Goldsmith did not contest the proposal to drop him from the rolls. Instead, Goldsmith petitioned the CAAF for extraordinary relief under the All Writs Act

statutes. Because the harmlessness of the omission of the materiality element was not addressed by the 11<sup>th</sup> Circuit with respect to the mail, bank and wire fraud convictions, these convictions were reversed and remanded so that a harmless error analysis could be employed.

*Richardson v. United States*, 506 U.S. 119, 119 S.Ct. 1707 (1999).

Richardson was charged with violating the Continuing Criminal Enterprise statute (CCE) (21 U.S.C. § 848(a)). CCE involves a violation of the drug statutes where such violation is part of a continuing series of violations. Richardson requested the district court to instruct the jury that it must unanimously agree on which three acts constituted the series of violations. However, the district court instructed the jurors that they must unanimously agree that the defendant committed at least three federal narcotics offenses and you do not have to agree as to the particular three or more federal narcotics offenses committed by the defendant.

Richardson was convicted of violating § 848 and the 7<sup>th</sup> Circuit affirmed. The Supreme Court found that a jury in a CCE case must unanimously agree not only that the defendant committed some continuing series of violations but also that the defendant committed each of the individual violations necessary to make up the continuing series. Accordingly, the judgment in the 7<sup>th</sup> Circuit was reversed.

*Clinton v. Goldsmith*, 506 U.S. 1538, 119 S.Ct. 1538 (1999).

Goldsmith, a Major in the Air Force, was ordered by his superiors to inform potential sex partners that he was HIV positive. However, Goldsmith violated this order by failing to inform 2 sex partners that he was HIV positive. Goldsmith was convicted by general court-martial of disobeying the order, aggravated assault, and battery and sentenced to serve a term of imprisonment. The Air Force Court of Criminal Appeals (CAAF) affirmed Goldsmith's conviction and sentence and the conviction became final when he sought no further review of it through the appellate process.

After the conviction became final, Congress enacted legislation empowering the President to drop any officer, from the rolls of the Armed Forces, who was sentenced by a court-martial to serve more than 6 months of confinement and who had served at least six months of the sentence. Based on this statute, the Air Force notified Goldsmith that it was taking action to drop him from its rolls.

(28 U.S.C. § 1651(a)). The CAAF found that it had no jurisdiction over the issue. However, after this decision was made, Goldsmith raised, for the first time, the

argument that the Air Force's action of dropping him from its rolls was unconstitutional. Goldsmith argued that the new statute authorizing his removal from the rolls violated the Ex Post Facto Clause because it was enacted after his conviction became final.

The CAAF granted the petition for extraordinary relief and enjoined Clinton from dropping Goldsmith from the Air Force's rolls. The Supreme Court reversed and found that the CAAF had jurisdiction to act only with respect to the findings and sentence as approved by the court-martial's convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.

The Court found that military appellate courts are empowered to issue extraordinary writs under the All Writs Act as long as their issuance is in aid of its existing statutory jurisdiction. However, the All Writs Act does not enlarge a court's jurisdiction. The CAAF is accorded statutory jurisdiction to only review the record in specified cases reviewed by the service courts of criminal appeals.

The Court found that the Air Force action to drop Goldsmith from its rolls was an executive action not a finding or sentence that was imposed by a court-martial proceeding. Thus, the elimination of Goldsmith from the rolls was beyond the CAAF's jurisdiction to review and beyond the aid of the All Writs Act. The Supreme Court found that once the Secretary of the Air Force has taken final action to drop Goldsmith from the rolls, Goldsmith can present his claim to the Air Force Board of Correction for Military Records or a federal trial court.

***Greater New Orleans Broadcasting Association Inc. v. United States*, CU.S.C., 119 S.Ct. 1923 (1999).**

Petitioners are members of an association of Louisiana broadcasters and affiliates who operate FCC-licensed radio and T.V. stations in the New Orleans area. But for the threat of sanctions pursuant to 18 U.S.C. ' 1304 and the companion FCC regulation, Petitioners would broadcast promotional advertisements for gaming available at private, for profit casinos that are lawful and regulated in Louisiana and Mississippi. 18 U.S.C. ' 1304 forbids a broadcaster from carrying advertising about privately operated commercial casino gambling regardless of the location of the station or the casino.

Petitioners filed a declaratory action in the district court seeking an order that ' 1304 and the FCC regulation violated the 1<sup>st</sup> Amendment. The district court ruled that ' 1304 and the regulation do not violate the 1<sup>st</sup> Amendment. The 5<sup>th</sup> Circuit affirmed and held that ' 1304's restriction on speech sufficiently advanced the asserted governmental interests and was not broader than necessary to control participation in casino gambling.

Strickler and Henderson were charged with the

In cases involving restrictions on speech that is commercial in nature, the Supreme Court employs a 4-part test to resolve 1<sup>st</sup> Amendment challenges: At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Under this test, the government bears the burden of identifying a substantial interest and justifying the challenged restriction.

The Court found that the content of the broadcasts is not misleading and concerns lawful activities (private casino gambling in Louisiana and Mississippi). Moreover, the Court found that the statute even promotes substantial interests that were served by the speech restriction ((1)- reducing the social costs associated with gambling; and (2)- assisting States that either restrict or prohibit gambling within their borders). However, the Court found that ' 1304 is difficult to defend after considering the quality of the interests promoted as well as the information that the government seeks to suppress.

The Court found that the speech restriction does not directly or materially advance the asserted governmental interests asserted. Furthermore, the Court also found that the statute and regulation are also pierced by exemptions and inconsistencies that they cannot be exonerated.

On one hand, the broadcasters were unable to advertise about commercial casino gambling regardless of the station's or casino's location. On the other hand, advertisement for tribal casino gambling authorized by state compacts are subject to no broadcast ban, even if the broadcaster is located in or broadcasts to jurisdictions with strict anti-gambling policies. Furthermore, 18 U.S.C. ' 1307(a)(2) exempts government operated and non-profit commercial casinos.

The Court also concluded that the second asserted interest provides no more convincing basis for upholding the regulation than the first. In sum, the Court concluded that the government cannot overcome the presumption that the speaker and the audience, not the government, should be left to assess the value of accurate and non-misleading information about lawful conduct. Accordingly, the Court held that the statute and regulation violated the 1<sup>st</sup> Amendment. ***Strickler v. Greene*, CU.S.C., 119 S.Ct. 1936 (1999).**

abduction and murder of a college student in Virginia.

Anne Stoltzfus testified in graphic detail about the abduction. However, documents and statements prepared by Stoltzfus, prior to trial, were inconsistent with her testimony and were not disclosed to Strickler's counsel. These documents were discovered by Strickler's counsel after the state post-conviction proceedings were completed and during federal *habeas* review.

Based on this discovery, Strickler raised the claim in federal *habeas* that the State violated the mandate of *Brady v. Maryland*, 373 U.S. 83 (1963). The district court granted Strickler's petition for a writ and vacated his murder conviction and death sentence. The 4<sup>th</sup> Circuit reversed after finding that Strickler failed to raise this claim at his trial or during collateral proceedings. Moreover, the 4<sup>th</sup> Circuit found that Strickler could not establish cause and prejudice for his procedural default.

In its opinion, the Supreme Court summarized the essential components of a *Brady* violation: 1.) The evidence was favorable to the accused because it was either exculpatory or impeaching; 2.) The evidence was either wilfully or inadvertently suppressed by the government; and 3.) Prejudice ensued.

A *Brady* violation occurs when the non-disclosure is so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.® In using this 3-prong test, the Court found that the information withheld was favorable to Strickler and was suppressed by the State.

However, before reaching a conclusion as to whether Strickler was prejudiced by the *Brady* violation, the Court examined whether he could demonstrate cause and prejudice to excuse his procedural default. In using a cause and prejudice standard, the Court found that there was cause for not raising the *Brady* claim because: 1.) Exculpatory documents were suppressed by Virginia; 2.) Strickler relied on the prosecutor's open-file discovery® policy as fulfilling the prosecutor's duty to disclose exculpatory evidence; and 3.) The State confirmed Strickler's reliance on the open-file discovery® policy.

The Court also found that even though Strickler's counsel must have known that Stoltzfus gave multiple interviews to the police, it by no means follows that they would have known that records pertaining to the interviews, or that the notes that Stoltzfus sent to the detective, exist and had been suppressed.®

However, the Court found that Strickler failed to convince it that there is a reasonable probability that the result of the trial would have been different if the suppressed documents were disclosed to the defense. The Court found that the record provided strong support for the conclusion that Strickler would have been convicted of capital murder and sentenced to death even if Stoltzfus was severely impeached.

In summary, even though Strickler established:

2 of the 3 components of a *Brady* violation (exculpatory evidence and the non-disclosure of the evidence by the prosecution) and cause for his procedural default; he did not establish prejudice from the *Brady* violation. Because prejudice was not established, the Court found that Strickler could not show materiality under *Brady* and the judgment of the 4<sup>th</sup> Circuit was affirmed.

*Jones v. United States*, CU.S.C., 119 S. Ct. 2090 (1999).

Jones was convicted of committing a kidnapping that resulted in death to his victim. After Jones was convicted, a separate sentencing hearing was conducted pursuant to 18 U.S.C. ' 3593. At the sentencing hearing, the jury concluded that Jones intended to kill his victim. The jury then found that the government proved, beyond a reasonable doubt, 2 statutory aggravating factors found in 18 U.S.C. ' 3592(c). Once Jones became death-eligible, the jury then had to decide whether he should receive a death sentence. In making this decision, the Federal Death Penalty Act of 1994 requires the jury to consider all aggravating and mitigating factors and determine whether the former outweighs the latter. Mitigating factors can be considered in the weighing process as long as one juror finds that the defendant established their existence by a preponderance of evidence whereas the government must prove aggravating factors beyond a reasonable doubt.

In its sentencing decision, the jury unanimously found that the government proved 2 statutory and 2 non-statutory (victim impact and victim vulnerability) aggravating factors. As to the mitigating factors, at least 1 juror found that Jones proved 10 of the 11 mitigating factors that he proposed and 7 jurors found the existence of a mitigating factor that he had not raised. After weighing the factors, the jury unanimously recommended that Jones receive a death sentence. The district court imposed the death sentence and the 5<sup>th</sup> Circuit affirmed.

Jones argued that the jury should have been instructed as to the consequence if it deadlocked on the penalty to be imposed. However, the Supreme Court found that neither the 8<sup>th</sup> Amendment nor the statute requires the court to instruct the jury as to the consequences of its failure to agree. Furthermore, the Court declined to exercise its supervisory powers to require an instruction on the effect of a deadlock in the sentencing phase.

Jones also argued that the jury was led to believe that if it could not reach an unanimous sentencing recommendation, he would receive a judge-imposed sentence that was less severe than life-imprisonment. However, because Jones did not object to the instruction given to the jury, the Court reviewed the issue for plain error and found none.

The Court held that there was no reasonable likelihood that the jury applied the instructions incorrectly. The district court did not expressly inform the jury that it would impose a lesser sentence in the event the jury deadlocked. Instead, the court simply informed the jury that if they recommend a lesser sentence, it would simply impose a sentence authorized by law.<sup>6</sup> Even assuming that plain error occurred, the Court found that Jones could not show that any confusion worked to his detriment.

Jones then argued that the district court erred by permitting the jury to consider non-statutory aggravating factors that were vague, overbroad, and duplicative. The Court found that assuming *arguendo*, that the court erred in allowing the jury to consider non-statutory aggravating factors that were vague, overbroad, or duplicative in violation of the 8<sup>th</sup> Amendment, the error was harmless beyond a reasonable doubt. An appellate court may conduct harmless-error review by considering either whether absent an invalid factor, the jury would have reached the same verdict or whether the result would have been the same had the invalid aggravating factors been precisely defined. The Court concluded that under either evaluation, the jury would have recommended the death penalty. Moreover, the Court found that the government's argument to the jury cured the factors of any infirmity as written.

***Martin v. Hadix*, CU.S.C., 119 S.Ct. 1998 (1999).**

The Prison Litigation Reform Act of 1995 (PLRA) limits the amount of fees that may be awarded to attorneys who successfully litigate prisoner lawsuits. In class action cases that began prior to the enactment of the PLRA, plaintiffs filed ' 1983 actions and entered consent decrees with the relevant state agencies. The district courts in both class actions found that the plaintiffs were ~~A~~prevailing parties<sup>6</sup> and were awarded attorneys fees. The courts also found that the attorneys were entitled to attorneys fees for post-judgment monitoring of the defendants' compliance with the settlement decrees. The fees were set at a ~~A~~market rate<sup>6</sup> of \$150.00 per hour.

The PLRA was enacted on April 26, 1996 and it caps attorney fees at a rate of 150% of the hourly rate paid to CJA panel attorneys. In these cases, this formula converts to an hourly rate of \$112.50 which is obviously less than the rates agreed to in the settlement decrees reached in both cases. The district court found that the PLRA did not limit fees for work performed before April 26, 1996. However, the court found that the PLRA did cap fees for services performed after the date of enactment. The 6<sup>th</sup> Circuit found that the PLRA did not apply to cases that were pending on the date that the legislation was enacted.

To determine if a new federal statute should apply to pending cases, the Supreme Court looks at the

following factors: 1.) Whether Congress has expressly prescribed the statute's proper reach; 2.) If there is no congressional directive on the temporal reach of a statute, the Court must determine whether the application of the statute to the conduct at issue would result in a retroactive effect; and 3.) If a retroactive effect results, the Court, in keeping with its ~~A~~traditional presumption<sup>6</sup> against retroactivity, will presume that the statute does not apply to that conduct.

The Supreme Court found that Congress did not expressly mandate the temporal reach of the PLRA. The language of the statute falls short of demonstrating a clear congressional intent favoring retroactive application of the fee limitations. Thus, the Court then considered whether the application of the fee provision to these cases would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective.

The Court found that long before the enactment of the PLRA, orders were entered establishing that the attorney fees were to be awarded at prevailing market rates (\$150.00 per hour). Thus, the application of the PLRA to work performed before its effective date would alter the fee arrangement by reducing the rate of compensation. This would attach new legal consequences to completed conduct which would result in a retroactive effect.

However, the Court also found that the application of the PLRA to work performed after its enactment did not present a retroactivity problem. On the date of the enactment of the statute, the plaintiffs' attorneys were on notice that their rate of pay was adjusted. From that point forward, the attorneys were on notice that they would be paid at a rate consistent with the statute and not the ~~A~~market rate<sup>6</sup> contained in the settlement agreement. In this context, the application of the PLRA has a future effect on future work because the attorney can choose not to perform services at the new lower rate. Thus, the Court concluded that the application of the PLRA to services performed after April 24, 1996 did not present a retroactivity problem.

### **RECENT 6<sup>th</sup> CIRCUIT DECISIONS**

***United States v. Bowman*, 173 F.3d 595 (6<sup>th</sup> Cir. 1999).**

Bowman transmitted false 1096 and 1099 tax forms to the IRS for Ohio residents and corporations that he claimed owed him money based on judgments that he took in the ~~A~~common law<sup>6</sup> courts. Bowman filed the IRS forms ~~A~~under the penalty of perjury<sup>6</sup> but later filed a request to rescind the documents and to correct the IRS records because the parties, in reality, received no compensation.

On appeal, Bowman challenged the statutory delegation of authority to the Assistant Attorney General to try his case under 26 U.S.C. § 7212(a). To support his argument, Bowman relied on 28 C.F.R.

§ 0.70(b) which states that an Assistant Attorney General, Tax Division, may not prosecute, among other things, "corrupt or forcible interference with an officer or employee acting under the Internal Revenue law."

The 6<sup>th</sup> Circuit rejected Bowman's argument and found that he was accused of violating the omnibus clause of § 7212(a) which reads, in pertinent part, that an individual may be prosecuted if he "obstructs or impedes, or endeavors to obstruct or impede, the due administration of the Internal Revenue laws." The Court interpreted § 7212(a) as authorizing the prosecution of two offenses: (1) intimidation or impeding an employee of the United States, corruptly or by threat of force, and (2) other activities which may obstruct or impede the due administration of Title 26.

Therefore, the Court held that § 0.70(b) addresses the delegation of authority to the Assistant Attorney General in the first offense set forth above. However, § 0.70(b) does not prohibit the delegation of a prosecution to an Assistant Attorney General for cases in which the omnibus clause is alleged to have been violated.

Next, Bowman argued that the government was required to prove that there was a pending IRS proceeding or investigation of which he was aware at the time he engaged in the obstructive conduct. Bowman argued that because there was no IRS investigation commenced when he violated § 7212(a), his conviction for count 1 must be reversed. The Court rejected this argument and found that an individual's deliberate filing of false forms for the purpose of causing the IRS to initiate action against a taxpayer, was encompassed within § 7212(a) as proscribed conduct. The filing of false tax forms was not legal when it was undertaken and was designed to cause a particular action on the part of the IRS.

*United States v. Taylor*, 176 F.3d 331 (6<sup>th</sup> Cir. 1999).

Taylor and Bruce Mominee agreed to rob another individual of her valuable collection of American Indian artifacts. As part of their agreement, Taylor agreed to find an accomplice to perform the robbery while Mominee would market the stolen collection. Taylor solicited the assistance of Frankie Piper who immediately informed the Kentucky State Police of the plan and agreed to assist in the investigation of Taylor and Mominee. Taylor then provided Piper with a firearm, a silencer, and a stun gun to commit the robbery. Two days later, Piper informed Taylor that the robbery was completed and when Taylor came to Piper's house to examine the booty, he was arrested and confessed his

involvement.

Taylor and Mominee were charged with and convicted of conspiracy to violate the Hobbs Act, using a firearm during and in relation to a crime of violence, possession of a firearm with an obliterated serial number, and possession of an unregistered firearm. However, the district court granted Taylor a new trial on the conspiracy and § 924(c) charges after which Taylor was again convicted.

Taylor argued that his § 924(c) conviction should be reversed in light of *Bailey v. United States*, 516 U.S. 137 (1995). Taylor contended that because his only act with the firearm was to transfer it to Piper, well in advance of the proposed robbery, the evidence was insufficient to prove that he "used" the firearm during and in relation to a crime of violence.

The 6<sup>th</sup> Circuit found that a conspiracy to violate the Hobbs Act is a crime of violence within the meaning of § 924(c). However, the Court found that Taylor's conduct was not a "use" of a firearm in connection with the conspiracy offense. The Court found that § 924(c) does not criminalize an attempt to use or carry a firearm during such an offense. The Court found that Taylor's transfer of a firearm to Piper, days in advance of the time when the object of the conspiracy (the robbery) was to occur, falls short of the "active employment" that *Bailey* mandates.

*United States v. Stotts*, 176 F.3d 880 (6<sup>th</sup> Cir. 1999).

Several volunteer firemen responded to a fire that started on a hot plate. A fireman noticed a small flash explosion but padded out the flames using his fire retardant gloves which he then turned over to the DEA for analysis. Another fireman saw Stotts hiding items in the house after the fire was under control. Two days later, a search warrant was executed at the residence. When Stotts was ordered to come downstairs, he attempted to flee. While Stotts was being subdued, an explosion occurred upstairs. A search of the upstairs yielded a methamphetamine lab, a detonated home-made bomb, and an unexploded bomb.

Firearms and other bomb making paraphernalia were also found in the same room as the lab. Stotts was convicted of manufacturing methamphetamine, using or carrying a destructive device during and in relation to a drug trafficking crime, using and carrying an unassembled destructive device during and in relation to a drug trafficking crime, and being a felon in possession of a firearm.

On appeal, Stotts challenged the search warrant affidavit and claimed that it did not contain probable cause to believe that criminal activity would be found at his residence. The 6<sup>th</sup> Circuit found that the district court did not err in finding that probable cause existed to justify the issuance of the search warrant.



Stotts also moved the district court to inform the jury of the possible penalties for the offenses for which he was on trial. The district court denied this motion and the 6<sup>th</sup> Circuit held that juries should not be instructed to consider the potential penalties to which a defendant would be subjected, if convicted, unless the jury has a specific role in sentencing. Because the jury had no sentencing function in this case, the district court did not err in refusing to instruct the jury about the applicable penalties.

Stotts also argued that the district court erred in not granting his motion for judgment of acquittal on the using and carrying an unassembled destructive device during and in relation to a drug trafficking crime. The device was found in a clothes basket, the fuse was not engaged, and no attempt was made to ignite the fuse. The government argued that even though the destructive device was unassembled, it was *used* during the course of a drug trafficking crime because it was *displayed*. When a firearm is *displayed* in a drug trafficking offense, it becomes an operative factor in relation to the predicate offense. The *display* of the gun sends a message and is in that sense *actively employed* during the drug trafficking offense.

The 6<sup>th</sup> Circuit found that the destructive device was not *displayed* and that the drugs that were found close to the undetonated bomb only established proximity and accessibility. Moreover, the Court concluded that the storage of the destructive device, with the intent to put it to a future active use, does not violate ' 924(c). Therefore, the 6<sup>th</sup> Circuit found that the district court erred in not granting Stotts' motion for judgment of acquittal on this offense.

Finally, Stotts argued that his convictions for using a destructive device during and in relation to a drug trafficking crime and being a felon in possession of a firearm violated the Double Jeopardy Clause because his possession of the gun and bomb was one *continuous act*. The 6<sup>th</sup> Circuit rejected this argument because the felon in possession of a firearm charge required proof that Stotts had a prior felony conviction. In comparison, the ' 924(c) offense required proof that Stotts used or carried a destructive device during and in relation to a controlled substance offense. Therefore, the two offenses each required proof of an element that the other did not and the Double Jeopardy Clause was not violated.

*United States v. Gold Unlimited, Inc.*,  
177 F.3d 472 (6<sup>th</sup> Cir. 1999).

The government alleged that Gold Unlimited, Inc. (Gold) operated an illegal pyramid or Ponzi scheme. A Ponzi scheme operates strictly by paying earlier investors with money tendered by later investors. By definition, a Ponzi scheme rewards participants for inducing other people to join the program. In contrast, Gold claimed that it did not operate a Ponzi scheme, but

instead, it operated a multi-level marketing program (MLM) in which it made money from product sales and not new recruits. To differentiate between pyramid schemes and MLMs, regulators evaluate the marketing strategies (emphasis on recruitment of people versus sales) and the percentage of products sold compared with the percentage of commissions awarded. Gold and two individuals were charged with mail fraud, money laundering, selling unregistered securities, and securities fraud. A jury convicted the defendants of these charges.

On appeal, Gold argued that the district court improperly defined a pyramid scheme. The court defined a pyramid scheme as a *process* characterized by the payment of money to the company in return for the right to sell a product and the right to receive, in return for recruiting other participants into the program, rewards which are unrelated to the sale of the product to ultimate users. Gold argued that this definition omits the refinement that a *pyramid* is improper only if it presents a danger of market saturation - that is, only at some point, persons on the lowest tier of the *stretcher* will not be able to find new recruits. Gold claimed that this instruction lumps legal MLM programs with illegal pyramid schemes.

The 6<sup>th</sup> Circuit held that the district court properly defined a pyramid scheme. The Court further found that the issue of anti-saturation was an affirmative defense that Gold carried the burden of establishing. The Court found that Gold failed to adduce evidence to support an anti-saturation instruction and the district court did not err by failing to instruct the jury on this point.

A pyramid scheme, without adequate anti-saturation policies, constitutes a scheme to defraud which is prohibited by the mail fraud statute. Part of the district court's jury instructions stated that a *pyramid* scheme constitutes a scheme or artifice to defraud for purposes of this count of the indictment. Neither party objected to this instruction at trial, but on appeal, Gold contended that once the government proved that he ran a pyramid scheme, the instruction released it of the burden of proving that Gold ran a scheme or artifice to defraud.

The 6<sup>th</sup> Circuit concluded that the instruction did not shift the burden of proving intent because the government was still required to prove that Gold devised a scheme or artifice to defraud. The instruction neither permitted nor commanded the jury to infer knowledge from any actions. Instead, the instruction only explained that a pyramid scheme constitutes a scheme or artifice to defraud as a matter of law. Therefore, by implication, if the jury found that Gold devised a pyramid scheme, it should also find that it devised a scheme or artifice to defraud.

At trial, the government introduced into evidence state court opinions, cease and desist orders, and stipulations to which Gold was a party. In these documents, six states informed Gold that it was operating a pyramid scheme and had broken state securities laws. These documents were admitted as probative evidence of knowledge, plan and intent. Moreover, the court provided a limiting instruction to the jury each time this evidence was adduced. The 6<sup>th</sup> Circuit found that because Gold denied all elements of the offenses, the evidence was properly admitted under Fed. R. Evid. 404(b). Moreover, because the jury was instructed to consider the evidence only as to knowledge, plan, and intent, but not as to guilt, the district court did not err in permitting its admission.

*United States v. Hoglund*, 178 F.3d 410 (6<sup>th</sup> Cir. 1999).

Hoglund is an attorney who represented three clients in personal injury cases and he agreed to accept a contingency of one-third of the amount of the recovery as his fee. Hoglund settled the clients' personal injury cases without their permission, forged their signature on settlement checks, and deposited the money into his own account. For this stunt, Hoglund was charged with five counts of bank fraud.

During the charge conference, Hoglund requested an instruction that provided that in order to convict, the jury must find that the bank was placed at a risk of loss. However, the district court instructed the jury that it was not necessary for the government to prove that anyone lost money. Instead, the government was only required to establish that the defendant intended to cause actual or potential loss to the financial institution.

Hoglund was convicted of bank fraud and the probation office argued that the restitution figure should include the full value of the settlement checks. In comparison, Hoglund argued that the 1/3 contingency fee that his clients agreed to pay should be deducted from the restitution figure. The district court rejected Hoglund's argument.

On appeal, Hoglund challenged the jury instructions given for the bank fraud counts. The government is required to prove three elements to establish a violation of the bank fraud statute: (1) defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; (2) defendant did so with the intent to defraud; and (3) the financial institution was insured by the FDIC. The 6<sup>th</sup> Circuit found that the government was not required to prove that the defendant exposed a bank to a risk of loss to establish a scheme to defraud. Accordingly, the Court found that the instructions given by the district court were not

Even though the government agreed to refrain from using Ford's statements at trial, he argued that the government may have made derivative use of his

erroneous.

The Court then considered Hoglund's argument on the restitution issue and found that a settlement sum does not belong jointly to the client and attorney. Instead, the money belongs solely to the plaintiff. The Court found that if Hoglund wanted to enforce his claim for 1/3 of the settlement proceeds, he must enforce it in a collection proceeding against the clients. Accordingly, the 6<sup>th</sup> Circuit affirmed the district court's restitution determination.

*United States v. Ford*, 176 F.3d 376 (6<sup>th</sup> Cir. 1999).

After being convicted of money laundering and gambling offenses, Ford was arrested on charges of jury tampering. The government alleged that Ford contacted a juror during the gambling and money laundering trial. After the arrest, the U.S. Attorney's Office received an unsolicited letter from a prisoner who was Ford's cell mate during the trial. The informant alleged that Ford threatened to do bodily harm to the AUSA who prosecuted the case as well as other law enforcement officials who had participated in the investigation.

Ford was indicted for obstruction of justice, witness tampering, and conspiracy to obstruct justice. After the indictment was returned, an informant, wearing a concealed recording device, was placed in Ford's cell. In a three hour conversation that proceeded, Ford did not mention plans to kill either the AUSA or other law enforcement officials. A superseding indictment was then returned but it merely re-alleged the original indictment that was returned relating to Ford's contact with a juror during his money laundering and gambling trial.

Prior to trial, Ford moved to suppress the tape-recording. Ford argued that the government violated his 6<sup>th</sup> Amendment rights because he was already represented when the informant elicited a statement from him. The government responded that it had no intention of using the recording at the trial. Accordingly, the district court denied Ford's motion as moot based on the government's representation.

On appeal, the 6<sup>th</sup> Circuit found that the 6<sup>th</sup> Amendment was not violated when law-enforcement officers arranged for an informant to converse with an indicted defendant about offenses other than those for which the defendant had already been indicted. Thus, if incriminating statements were deliberately elicited by the informant relating to the charged offense, they must be suppressed. However, the 6<sup>th</sup> Amendment does not bar the initiation of the interview or the use of any incriminating statements elicited on an uncharged offense.

statements and that he was entitled to a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441(1972). At a *Kastigar* hearing, the government is required to prove

that none of the evidence it sought to introduce at trial was derived, directly or indirectly, from the defendant's statements. The 6<sup>th</sup> Circuit found that the rationale for a *Kastigar* hearing is based on the 5<sup>th</sup> Amendment prohibition against compelled self-incrimination. However, the claim in this appeal was predicated on the violation of Ford's 6<sup>th</sup> Amendment right to counsel. Therefore, the Court questioned the propriety of a *Kastigar* hearing. In any event, the issue of suppression was moot because the government agreed to refrain from using the conversation.

Ford also sought disqualification of the prosecutor because he initiated contact with an individual who was represented in a criminal case. The 6<sup>th</sup> Circuit rejected this argument and found that there was significant precedent that permitted law-enforcement contact with represented persons who were being investigated for crimes, other than those on which they had already been indicted. In this case, the contact did not pertain to the subject of the representation because the prosecutors were investigating offenses other than those on which Ford was already indicted.

*United States v. Caldwell*, 176 F.3d 898 (6<sup>th</sup> Cir. 1999).

The Kentucky State Police were investigating a kidnapping which caused them to visit Caldwell at his mobile home. Caldwell invited the troopers inside. Two troopers went inside the mobile home while one remained outside. Once inside, the troopers asked Caldwell if he had any firearms and he replied affirmatively. A firearm was located under the mattress on which Caldwell was sitting and a search of the home ensued. The trooper outside saw more than a thousand marijuana plants growing and Caldwell was arrested and convicted of manufacturing marijuana and possession of a firearm by a convicted felon.

In the indictment, the government alleged that Caldwell manufactured more than one thousand plants of marijuana. However, over Caldwell's objection, the jury was instructed that the government was not required to prove that he manufactured a specific quantity of marijuana. Instead, the government was only required to prove that a measurable quantity of marijuana was manufactured. Caldwell argued that the jury instructions constructively amended the indictment because the grand jury alleged that he manufactured a specific number of plants but the government was not required to prove that quantity.

The 6<sup>th</sup> Circuit rejected Caldwell's argument. 21 U.S.C. § 841(a)(1) only requires the government to prove that the defendant: (1) knowingly and intentionally; (2) manufactured marijuana. Drug quantity

The 6<sup>th</sup> Circuit found that Rule 35 does not afford the district court the opportunity to reconsider its

is not an element of the offense but is only relevant in determining the applicable penalty. The Court found that the drug quantity was surplusage in the indictment that did not magically become an element of the offense upon appearing in the indictment.

However, the 6<sup>th</sup> Circuit was sensitive to the argument that the inclusion of a quantity in the indictment and its deletion in the jury instruction might prejudice the defendant and influence the jury's evaluation of the evidence properly before it. Therefore, even though no prejudice was demonstrated in this case, the Court urged district courts to delete the specific quantity from its instructions and quote a redacted version of the indictment when instructing a jury.

*United States v. Durham*, 178 F.3d 796 (6<sup>th</sup> Cir. 1999).

Durham was placed in a half-way house by the Bureau of Prisons and failed to return from a work release assignment. Durham was indicted for escape and he pled guilty to the offense. Four months after entering a guilty plea, Durham filed a *pro se* motion seeking to withdraw his plea and he argued that the government coerced his plea. Durham's motion was denied and it was one of the grounds for this appeal.

The 6<sup>th</sup> Circuit found that a court may permit a defendant to withdraw a plea prior to sentencing if he shows any fair and just reason. There are six factors that must be considered by a reviewing court in determining whether to grant a motion to withdraw a guilty plea: (1) the length of time between the guilty plea and the filing of the motion; (2) the defendant's reason for not presenting the grounds earlier; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances surrounding the plea, the nature and background of the defendant, and whether the defendant has admitted guilt; (5) the potential prejudice to the government; and (6) the defendant's prior experience in the criminal justice system. The Court considered all of these factors and concluded that they supported the district court's denial of Durham's motion to withdraw his plea.

After sentencing, Durham filed a Rule 35 motion to correct the sentence imposed. While he was being arrested, Durham assaulted one of the arresting officers and this caused his base offense level to be enhanced. In his Rule 35 motion, Durham alleged that the district court erred by applying the two level reckless endangerment enhancement when it had already used this conduct to deny a four level reduction for escaping from a half-way house (USSG § 2P1.1(a)(1)).

interpretation of the Guidelines. Instead, Rule 35 only permits a court to correct a sentence imposed as a result

of an arithmetical or technical error. The Court, after reviewing the facts of this case, found that because all adjustments in the Guidelines are to be applied cumulatively, the sentence imposed was not erroneous.

**Carson v. Burke**, 178 F.3d 434 (6<sup>th</sup> Cir. 1999).

Carson was convicted in state court for felony offenses. Eight years after the convictions became final, Carson filed a ' 2254 petition. One of the bases on which the district court denied Carson's petition was the doctrine of *laches*. The State of Michigan did not raise the *laches* defense but, instead, the district court *sua sponte* raised the issue for the first time in its decision dismissing the petition. The district court found that Carson's delay in filing his petition prejudiced the government and that he had not established that a miscarriage of justice occurred or that he was innocent in fact.

The 6<sup>th</sup> Circuit affirmed the district court's order by finding that *laches* does apply to *habeas* cases.

Where a *habeas* petition is filed several years after the underlying trial and the government is prejudiced by the unavailability of key witnesses, *laches* operates to preclude the district court from considering the petition.

Furthermore, the Court found that the district court did not err in dismissing the petition *sua sponte* even though Carson was not given the opportunity to address the claim of prejudice.

**United States v. Dale**, 178 F.3d 429 (6<sup>th</sup> Cir. 1999).

Dale was charged with one count of conspiracy to distribute both cocaine base and marijuana. Dale moved the district court to either dismiss or sever the conspiracy count. The district court instructed the jury that it was obligated to unanimously agree as to which controlled substance, or both, that Dale conspired to distribute in order to return a guilty verdict on the multiple object conspiracy. However, the jury was only instructed to return a general verdict.

The 6<sup>th</sup> Circuit found that the allegation, in a single count of conspiracy, of an agreement to commit several crimes does not render the count duplicitous because conspiracy is the crime charged. Thus, a single conspiracy with its objects being the distribution of two different drugs, is not duplicitous.

However, the 6<sup>th</sup> Circuit remanded the case for resentencing. The maximum sentence for conspiracy to distribute a controlled substance is dependent on the controlled substance that was distributed. In this case, the maximum sentence for the marijuana conspiracy was five years while a conspiracy to distribute crack had a maximum sentence of 40 years.

The 6<sup>th</sup> Circuit held that the district court committed plain error when it imposed a sentence using the statutory maximum for crack rather than marijuana.

The Court found that the shorter maximum sentence should be used if the jury merely returns a general verdict on a conspiracy charge where the objects of the conspiracy call for different statutory maximum sentences. Therefore, the case was remanded to the district court to allow the government to either elect to consent to the imposition of a five year sentence or to retry Dale.

**Jones v. United States**, 178 F.3d 790 (6<sup>th</sup> Cir. 1999).

The facts of this case were previously set forth at 161 F.3d 397 (6<sup>th</sup> Cir. 1998) and were featured in Volume 10 of this Newsletter (February 1999). In this case, Jones's attorney, Massey, informed Jones that if he went to trial he would more than likely receive a 10 year sentence and this was the mandatory minimum sentence.

Among other things, this caused Jones to reject a plea offer in which he was guaranteed to receive a sentence that did not exceed five years.

After being convicted, Jones received a 27 year sentence and he claimed that Massey was ineffective because he failed to advise him that relevant conduct could be used to enhance his sentence. Moreover, Jones was not informed that relevant conduct included prior illegal drug sales regardless of whether they resulted in convictions.

The Court found that Massey's performance was not deficient. However, Massey's failure to inquire further about Jones's relevant conduct or to advise him of the consequences of relevant conduct came close to being objectively unreasonable. Even if Massey failed to advise Jones that relevant conduct could affect his sentence, Jones did not demonstrate that he would have accepted the plea offer. Therefore, Jones failed to demonstrate prejudice even assuming, *arguendo*, that Massey's performance was deficient.

**Harper v. Parker**, 177 F.3d 567 (6<sup>th</sup> Cir. 1999).

Harper is a death row inmate in Kentucky and he sought to waive further review of his conviction. At an evidentiary hearing held in the district court, Harper testified that he wanted to waive his appeal because there was little chance that his conviction would be overturned. Moreover, Harper stated that he had no desire to continue to live his life in prison.

Pursuant to 18 U.S.C. ' 4241, the district court held a preliminary hearing to determine if there was reasonable cause to believe that Harper was suffering from a mental illness or defect rendering him mentally incompetent to waive his right to further appeals. The court concluded that Harper was competent to waive and the Kentucky Department of Public Advocacy (DPA) appealed this determination.

The 6<sup>th</sup> Circuit found that the district court did not abuse its discretion by finding that Harper was competent to waive his right to further appeals. In order to prove that Harper was incompetent, the DPA must demonstrate either that Harper: 1.) cannot appreciate his position and make a rational choice to continue litigating his appeal, or 2.) currently suffers from a disease, disorder, or defect that may substantially affect his capacity to make this choice. The 6<sup>th</sup> Circuit concluded that nothing that the DPA presented suffices to provide reasonable cause to believe that Harper is not totally competent to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.®

*United States v. Davis*, 177 F.3d 552 (6th Cir. 1999).

Five defendants appealed from convictions entered in a drug, robbery, and firearms trial. The defendants contended that the district court erred in refusing to grant a mistrial in order to cure alleged juror misconduct. After completion of the presentation of evidence, a juror, Estes, sent the district court judge a note requesting to be excused from further jury service.

Estes wanted to be excused because he had previously done business with some of the defendants and he feared for his safety if he was identified as a juror who participated in a decision leading to their convictions. Moreover, an employee of Estes informed him that members of the community were aware of his jury service and that his role in the trial was a topic of conversation.

The district court took no immediate action in response to the note. However, before the jurors were charged, Estes again requested to be excused from jury service. At this point, a hearing was conducted where Estes' concerns were thoroughly explored. During the hearing, Estes stated that other jurors on the panel sympathized with his plight and did not blame him from seeking to be excused from further jury service.®

The defendants moved for a mistrial and their motions were denied. Estes was removed from the panel but the remaining jurors were not given any explanation or instructions regarding the incident. Moreover, the remaining members of the panel were not questioned about their contact with Estes.

The 6<sup>th</sup> Circuit found that when possible juror misconduct is brought to the trial judge's attention, he has a duty to investigate and to determine whether there may have been a violation of the defendant's right to a fair trial.

On appeal, Hendrick argued that her offense level should have been determined based on her criminal record and not the record of the principal. The 6<sup>th</sup> Circuit remanded and concluded that the offense level of the defendant convicted of aiding and abetting should not be calculated using the criminal record of the principal

by a panel of impartial jurors. A new trial is not necessary every time a question of juror partiality arises. Instead, where a colorable claim of extraneous influence has been raised, a hearing must be conducted pursuant to *Remmer v. United States*, 347 U.S. 227 (1954) to afford the defendant an opportunity to establish actual bias. At a *Remmer* hearing, the defendant bears the burden of proving actual juror bias, and no presumption of prejudice arises merely from the establishment that improper contact occurred.

The Court found that the district court did not properly deal with this claim of juror misconduct by merely questioning Estes about his unauthorized contact with his employee. Instead, the court should have also questioned the remaining jurors as to whether they were influenced by Estes' remarks concerning his fear for his safety. The 6<sup>th</sup> Circuit found that a further inquiry of the entire panel was necessary to ensure the impartiality of the jury. Therefore, the defendant's convictions were vacated and the case was remanded for a *Remmer* hearing. At this hearing, the district court was ordered to make available any of the jurors that defense counsel wanted to question about their recollection of the deliberative process, Estes' comments, and the weight that those comments played in the determination of the verdicts. Because the defendants bear the burden of demonstrating the existence of jury taint, if this questioning fails to establish that improper extra-judicial comments influenced the jurors' deliberations, a retrial will not be necessary.

*United States v. Hendrick*, 177 F.3d 547 (6<sup>th</sup> Cir. 1999).

Hendrick pled guilty to aiding and abetting a felon in possession of a firearm. The presentence report recommended an offense level of 14 to which neither party objected. However, the district court concluded that Hendrick's proper offense level was 24 which was the same offense level applied to the principal offender.

In this case, the principal offender had at least two prior felony convictions for violent crimes or controlled substance offenses which mandated an offense level of 24 under USSG ' 2K2.1(a)(2). However, based on Hendrick's lack of a criminal record, her offense level would be 14 because she was only a prohibited person.®

The district court reasoned that USSG ' 2X2.1 required an aider and abetter to have the same offense level as the principal offender.

Instead, the aider and abetter's offense level should be calculated by using her own record. USSG ' 2K2.1 provides an offense level for unlawful possession of a firearm depending on the individual's criminal record. It would negate this objective to interpret ' 2X2.1 to require sentencing courts to automatically apply

this same offense level to all defendants involved in the commission of a crime without considering their respective criminal histories. The Guidelines require a sentencing court to treat the aider and abettor as though he committed the underlying offense not as though he and the principal are the same person.®

*United States v. Stevens*, 177 F.3d 579 (6<sup>th</sup> Cir. 1999).

Stevens, Faulkner, and Bommarito were indicted for stealing construction equipment and conspiring to steal the equipment. Because a lay witness refused to testify against Bommarito, the charges against him were dismissed. Prior to the commencement of the trial for the remaining defendants, the government became aware that it might have difficulty convincing Pizzo, the key witness against Stevens, to testify. On the third day of trial, Pizzo and his attorney informed the court that Pizzo refused to testify regardless of whether he was conferred immunity. Pizzo was jailed for contempt and the trial was continued five days to provide Pizzo an opportunity to consider his options. Nonetheless, after this five day continuance, Pizzo still refused to testify.

The government indicated that it would move for a mistrial but that its motion would be made at the close of the evidence to provide Pizzo a further opportunity to change his mind. However, at the conclusion of the government's evidence 15 days later, Pizzo still refused to testify. Without Pizzo's testimony, the government conceded that it had insufficient evidence to convict Stevens. Therefore, the government moved for a mistrial because Pizzo was unavailable.® Moreover, the government argued that it was prejudiced by Pizzo's unavailability because it referenced his anticipated testimony in its opening statement.

The government's motion for a mistrial was granted and prior to the commencement of the second trial, Stevens filed a motion to dismiss the indictment on double jeopardy grounds. This motion was denied because the district court claimed that it granted the government's motion for a mistrial based on a manifest necessity.® The 6<sup>th</sup> Circuit held that when a criminal trial ends in a mistrial, reprosecution is permitted only if there was a manifest necessity for a mistrial or the ends of public justice would otherwise be defeated.®

On appeal, the government argued that there was manifest necessity due to the unfair prejudice it experienced based on Pizzo's refusal to testify. However, the 6<sup>th</sup> Circuit held that Pizzo's refusal to testify did not create a manifest necessity that would justify a mistrial. Instead, the Court found that a mistrial is properly declared if an impartial verdict cannot be reached (e.g. hung or tainted jury) or if a guilty verdict could be reached but would have been reversed on appeal due to an obvious procedural trial error.

In deciding whether a witness's unavailability meets the necessity for mistrial, it is essential to consider what purpose is served by declaring a mistrial. In this case, there are only two purposes that are served by declaring a mistrial: (1) allowing the government to gather more evidence against the defendant; or (2) the witness will eventually agree to testify. The 6<sup>th</sup> Circuit found that both of these purposes were unacceptable because the Double Jeopardy Clause would be defeated by allowing the government to make another attempt to coerce the witness.

The Court held that we do not believe the Double Jeopardy Clause bars reprosecution only when the court finds that the witness will never agree to testify.® In some cases, like this one, the government is unable to proceed when contempt sanctions failed to overcome the will of the witness. Once the trial court has given up coercing the witness, the indictment cannot be kept alive indefinitely in the hope that the witness will some day have a change of heart.®

*Arredondo v. United States*, 178 F.3d 778 (6<sup>th</sup> Cir. 1999).

Arredondo was convicted for his role in a conspiracy to distribute heroin and cocaine in Michigan and his conviction was affirmed by the 6<sup>th</sup> Circuit. Arredondo's counsel did not object to the relevant conduct determination that was contained in the presentence report. Therefore, this quantity was adopted and used by the district court at sentencing.

Later, Arredondo filed a ' 2255 motion and argued that his counsel was ineffective for failing to inform him of a plea offer tendered by the government. Moreover, Arredondo alleged that his counsel was ineffective for failing to object to the relevant conduct determination found in the presentence report. The Court denied the petition and Arredondo filed a timely notice of appeal.

To obtain relief for ineffective assistance of counsel under ' 2255, Arredondo must establish that: (1) his lawyer's performance was deficient when compared to an objective standard of reasonable performance; and (2) there is a reasonable probability that the lawyer's errors prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668 (1984).

The government conceded that the failure to inform a client of a plea offer is probably a serious error that would satisfy the performance prong of *Strickland*. However, the government contended that the plea offer was never made. Thus, the 6<sup>th</sup> Circuit considered whether the district court was obliged to conduct an evidentiary hearing on whether a plea offer was extended, but not conveyed, to Arredondo.

The Court found that an evidentiary hearing is required unless the record conclusively shows that the petitioner is entitled to no relief. The 6<sup>th</sup> Circuit found that Arredondo did not offer any admissible evidence that a plea offer was made on the eve of trial. However, there was credible evidence that a plea offer was made prior to the plea cut-off date. The pleadings at the district court showed that an offer was made, but not conveyed, to Arredondo. There was no information pled by the government to rebut this claim. Therefore, the district court erred by denying this claim without further hearing.

The Court then considered whether Arredondo's attorney's performance was deficient and whether Arredondo was prejudiced by this performance. The government conceded that its estimate of relevant conduct did not produce a quantity exceeding 1 kilogram of heroin. Nonetheless, the district court used a quantity that exceeded 1 kilogram of heroin to calculate Arredondo's offense level.

However, the government argued that an attorney's performance was not deficient as long as the relevant conduct determination was in the ballpark with the government's estimate. The 6<sup>th</sup> Circuit rejected this argument because sentencing courts are required to err on the side of caution when calculating drug quantities. The critical issue was whether Arredondo was responsible for more or less than one kilogram of heroin. The difference in sentencing was significant because a quantity of less than 1 kilogram led to a sentence of 12 years whereas a sentence of 20 years was mandated if more than 1 kilogram of heroin was calculated.

The Court found that counsel's failure to investigate, participate in, and prepare for the sentencing proceeding failed to satisfy an objective standard of reasonable representation. Consequently, this performance fell below the 6<sup>th</sup> Amendment standards for effective assistance of counsel. The 6<sup>th</sup> Circuit also found that Arredondo was prejudiced by this deficient performance. The government's figures used to calculate relevant conduct equated to far less than 1 kilogram of heroin. Therefore, the 6<sup>th</sup> Circuit found that if the district court engaged in a careful inquiry about the scope of Arredondo's participation in the conspiracy, it would have attributed less than 1 kilogram of heroin to his offense level.

*Caldwell v. Russell*, 346 F.3d 1000, 1009 (6<sup>th</sup> Cir. 1999).

In 1987, Caldwell was indicted for murder and possession of a weapon under disability in violation of the Ohio Revised Code. At the trial, Caldwell did not oppose

The Court found that the due process sufficient evidence guarantee does not implicate affirmative defenses because proof supportive of an affirmative

the state's proof of the elements of murder. Instead, Caldwell argued that he acted in self-defense. A jury convicted Caldwell but his conviction was reversed on appeal. At his second trial, Caldwell was again convicted and his conviction was affirmed on direct appeal. In 1994, Caldwell filed a 2254 petition that was dismissed by the district court.

To prevail in a 2254 action, the petitioner must prove that: a state court trial error denied him a federal constitutional right; such denial has caused him actual prejudice; and it had a substantial and injurious effect or influence in determining the jury's verdict. In this appeal, Caldwell contended that the prosecutor's closing argument deprived him of a fair trial by citing facts that were not in evidence. Moreover, Caldwell also argued that the prosecutor injected his opinion about Caldwell's guilt in his closing argument.

Prosecutorial misconduct may warrant habeas relief only if the misstatement was so egregious as to render the entire trial fundamentally unfair and constitute a due process violation. The Court rejected Caldwell's argument that the prosecutor relied on evidence outside of the record in making his closing argument.

Moreover, the Court also rejected Caldwell's claim that the prosecutor injected his own belief as to Caldwell's guilt in his closing argument. In the closing argument, the prosecutor stated he believed that all of the testimony shows beyond a reasonable doubt that Caldwell purposely took the life of Ricky Lee Henry. The Court found that ordinarily, a prosecutor may not express a personal opinion concerning the guilt of the defendant. The reason for this rule is that such personal assurances of guilt or vouching exceeds the legitimate advocate's role by improperly inviting the jurors to convict the defendant on a basis, other than a neutral independent assessment of the record proof. However, the Court found that the prosecutor's statement was a way of stating that the evidence supported the conclusion that Caldwell was guilty.

Caldwell also asserted on appeal that there was insufficient evidence to support his murder conviction. However, Caldwell procedurally defaulted this issue by failing to raise it on direct appeal. A federal habeas forum may excuse a procedural default only if a fundamental miscarriage of justice would otherwise result. A defendant may be convicted of a crime in accordance with due process upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

defense cannot detract from proof beyond a reasonable doubt that the accused committed the requisite elements of the crime. Caldwell never denied that he purposely

killed Henry; instead, he only faulted the jury's refusal to credit his affirmative defense to the killing. Thus, the Court found that Caldwell did not set forth a fundamental miscarriage of justice to excuse his procedural default.

**Lucas v. O'Dea**, C F.3d C, 1999 WL 346166 (6<sup>th</sup> Cir. 1999).

This is an opinion that amends the 6<sup>th</sup> Circuit's decision filed at 169 F.3d 1028 (6<sup>th</sup> Cir. 1999) and featured in Volume 11 of this Newsletter (May 1999). In the prior opinion, the Court found that there was a fatal variance between the indictment and the jury instructions on the murder charge. There are two types of modifications to indictments -- amendments and variances. An amendment occurs when the charging terms of the indictment are altered either literally or in effect, by the prosecutor or the court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

In this case, Lucas was charged with attempted murder, but the jury instructions permitted a conviction for wanton murder. Thus, the variance was sufficiently material to constitute a constructive amendment that was determined to be *per se* prejudicial.

However, even though Lucas demonstrated this constitutional violation, it was procedurally defaulted because it was not raised on direct appeal. In order to overcome this procedural default, Lucas was required to demonstrate cause and prejudice for the default. Ineffective assistance of counsel can constitute an excuse for a procedural default. However, in order to prevail on an ineffective assistance of counsel claim, the defendant must prove that his counsel's performance was constitutionally deficient. Furthermore, the defendant must show that he was prejudiced by counsel's performance.

The Court found that the failure of Lucas' counsel to object to the jury instruction rendered his defense meaningless. The instruction had the effect of directing a guilty verdict on the murder charge. Therefore, the 6<sup>th</sup> Circuit found that Lucas' attorney's performance fell below the level of competence required by *Strickland*. Furthermore, there was a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

The Court also found that the district court did not err by denying Lucas' claim that his counsel's failure to object to a sentencing enhancement constituted ineffective assistance of counsel. Lucas' murder sentence was enhanced under the persistent felony offender statute and the enhancement was not litigated on direct appeal.

In the alternative, the 6<sup>th</sup> Circuit found that even if Gilliam set forth a Confrontation Clause violation,

However, two years after Lucas was convicted, the Kentucky Supreme Court held that a murder conviction was not subject to the persistent felony offender enhancement.

The Court found that counsel's failure to raise an issue whose resolution is clearly foreshadowed by existing decisions might constitute ineffective assistance of counsel. However, the 6<sup>th</sup> Circuit found that the Kentucky Supreme Court decision was not foreshadowed by existing Kentucky case law. Accordingly, the Court found that this was not one of the cases for finding counsel ineffective because he failed to anticipate a development in the law.

**Gilliam v. Mitchell**, C F.3d C, 1999 WL 371273 (6<sup>th</sup> Cir. 1999).

Gilliam was convicted under Ohio law for an armed robbery and sought federal *habeas* review pursuant to ' 2254. The district court denied Gilliam's petition and on appeal, he alleged that his 6<sup>th</sup> Amendment right to confront witnesses was violated when the statement of a non-testifying co-defendant was admitted.

When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, the statement is admissible only if it bears an adequate Aindicia of reliability.@ Reliability can be inferred in a case where the evidence falls within a Afirmly rooted@ hearsay exception. In other cases, the evidence must be excluded, unless there is a showing that the statement has a particularized guarantee of trustworthiness.

If the Court found a Confrontation Clause violation, Gilliam asked it to employ a harmless error analysis consistent with *Chapman v. California*, 386 U.S. 18 (1967) (error must be harmless beyond a reasonable doubt) rather than the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (error must have a substantial and injurious influence in determining the verdict). Gilliam argued that the reason for using the *Chapman* standard is that the district court was the first court to review the issue for harmless error.

The Ohio Supreme Court had previously found that the statement of a non-testifying witness was admissible because it fell within a Afirmly rooted hearsay exception and had a guarantee of trustworthiness.@ The 6<sup>th</sup> Circuit agreed that a statement against interest is a firmly rooted hearsay exception for purposes of Confrontation Clause analysis. Therefore, the admission of the statement did not deprive Gilliam of his right to confront and cross-examine his accusers.

the error was harmless. The Court arrived at this conclusion using the *Brecht* standard, even though a



federal court was the first court to review the issue for harmless error.

**Tucker v. Prelesnik** C F.3d C, 1999 WL 374105 (6<sup>th</sup> Cir. 1999).

Tucker and Henderson were co-workers at a McDonald's Restaurant in Detroit. While he was working, Henderson was attacked, severely beaten, and rendered unconscious. Charges were originally filed against two individuals, but not Tucker. However, ten months after the attack, charges against these individuals were dismissed and they were filed against Tucker.

A few weeks prior to the trial, Tucker's trial counsel received a letter from Henderson's workmen's compensation attorney that stated that Henderson was unable to testify with specificity as to the identity of the individuals who assaulted and severely beat him. Tucker's attorney interpreted this letter as indicating that Henderson would not testify at Tucker's trial. Accordingly, Tucker's attorney did nothing to prepare for trial.

Needless to say, Henderson did testify at Tucker's trial and he was the only witness called by the prosecution. At a bench trial that lasted less than one hour, Tucker was convicted of assault with intent to do great bodily harm. On appeal, Tucker argued that he did not receive the effective assistance of counsel and his case was remanded to the trial court for an evidentiary hearing. At the hearing, new counsel introduced hospital records that called into question Henderson's ability to identify his assailant. However, the trial judge rejected Tucker's argument and this decision was affirmed by Michigan's Appellate and Supreme Courts.

After the enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Tucker filed a ' 2254 petition which was granted by the district court. The court found that Tucker was deprived of the effective assistance of counsel when his trial counsel failed to obtain the medical records of the complainant.

The court also found that the state courts unreasonably applied the Supreme Court's standard for relief for an ineffective assistance claim.

Under the AEDPA, a writ of *habeas corpus* may not issue unless the state court proceedings: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The 6<sup>th</sup> Circuit found that this case only presented the issue of whether the lower courts engaged in an unreasonable

On remand, the original sentencing judge received a revised presentence report that advocated an increase of Jackson's criminal history category because

application of Federal law as determined by the Supreme Court.

The Court found that the writ may issue under the 'unreasonable application' phrase if a court concludes that the state court decision was so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible credible outcomes. Stated another way, in the 6<sup>th</sup> Circuit, the writ will issue if the unreasonableness of the state court's application of clearly established precedent is not debatable among reasonable jurists.

The 6<sup>th</sup> Circuit found that the state courts applied the correct legal standard in evaluating Tucker's *Strickland* claim. However, the Court found that the unreasonableness of the state court's application of the *Strickland* standard was not debatable among reasonable jurists. The Court found that Tucker's counsel, unprepared and assuming that the prosecution would present no evidence against his client, nevertheless, declined to request a continuance to prepare. His failure to do so, when he knew that he was unprepared for trial and had not obtained critical evidence of which he was aware, could not be considered representation within the wide range of reasonable professional assistance. Moreover, no conceivable trial strategy would include a decision to proceed unprepared when counsel has learned that his assumption that the prosecution would not present evidence was unfounded.

The Court concluded that Tucker was deprived of the effective assistance of counsel when his counsel failed to: request a continuance; obtain medical records that cast serious doubt on the reliability of Henderson's testimony; and obtain and use Henderson's contradictory prior statements for impeachment. In the face of this evidence, the state judge, amazingly, concluded that Tucker's counsel's failure to obtain and introduce favorable evidence and to request a continuance was within the range of reasonable professional assistance. The 6<sup>th</sup> Circuit found that this conclusion was not only unreasonable, but its unreasonableness was not debatable among reasonable jurists. Therefore, the district court's decision to grant the writ was affirmed.

**United States v. Jackson**, C F.3d C, 1999 WL 374109 (6<sup>th</sup> Cir. 1999).

Jackson was convicted of conspiracy to distribute cocaine and sentenced to serve 262 months. On direct appeal, the 6<sup>th</sup> Circuit affirmed Jackson's conviction but found that the amount of relevant conduct was improperly calculated. Thus, the case was remanded for resentencing.

his original criminal history category was miscalculated. After revisiting the relevant conduct issue, the district court reduced the quantity by one-half, resulting in a

reduction of the offense level from a level 38 to level 36. Moreover, Jackson's criminal history was increased from II to III. The district court imposed a sentence of 292 months and Jackson again appealed and alleged that the district court had a retaliatory motivation in sentencing.

Constitutional due process requires that a vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear on record. The 6<sup>th</sup> Circuit found that the vindictiveness rule also applies where a defendant is merely resentenced and not retried on remand.

Due process does not forbid enhanced sentences but it does prohibit actual vindictiveness against a defendant for exercising his constitutional rights. The vindictiveness principle is a prophylactic rule that provides for a presumption of vindictiveness which may be overcome only by objective information in the record justifying the increased sentence.

The 6<sup>th</sup> Circuit found that the district court originally sentenced Jackson to the low end of the guideline range (262 months out of a range of 262-327 months). However, after a successful appeal, the district court selected a sentence at the high end of the new range (292 months out of a 235-293 month range).

The Court found that this sentence presented a presumption of vindictiveness. Therefore, due process compelled the sentencing judge to give objective reasons justifying the higher sentence. The Court found that while the district court's explanation contained objective reasons to justify the sentence and thereby satisfied statutory and sentencing guideline requirements, it failed to adequately explain the need to increase Jackson's sentence. The articulated reasons were available to the district court when Jackson was first sentenced. Thus, the articulated justification for the sentence failed to ensure that a non-vindictive rationale lead to the higher sentence. Therefore, the case was remanded to the district court either for resentencing or a more precise explanation as to why the sentence imposed was more severe than originally imposed.

***Shorter v. The Ohio Department of Rehabilitation and Corrections***, C F.3d C, 1999 WL 377508 (6<sup>th</sup> Cir. 1999).

Shorter procedurally defaulted the appeal of his state conviction. Shorter claimed the reason for his procedural default was the failure of the Postal Service to

Therefore, because the warrant was deficient, the 6<sup>th</sup> Circuit next examined whether the good faith exception could justify the search. The Court found that because the affidavit sufficiently described the

timely deliver his merit brief to the Ohio Supreme Court which caused the dismissal of his appeal. The district court dismissed Shorter's ' 2254 petition after finding that the failure of the Postal Service to timely deliver the merit brief did not constitute cause for Shorter's procedural default.

The 6<sup>th</sup> Circuit found that the cause under the cause and prejudice test is something external to the habeas petitioner, something that cannot fairly be attributed to him. The Court also found that it is immaterial that Shorter's counsel could not control the delivery of the brief once it was submitted to the vagaries of the Postal Service's operations. Shorter's counsel knew the brief was scheduled to be filed on a specific date but he elected to deposit it into the mail two days prior to the date on which it was due to be filed. Counsel's efforts to comply with the Ohio Supreme Court's procedural rules governing the timely filing of briefs were not impeded by some objective factor external to the defense. Instead, the Court held that counsel's efforts to comply were simply inadequate as he could have driven the brief to Columbus for filing as opposed to placing the document in the mail. Accordingly, the order dismissing the ' 2254 petition was affirmed.

***United States v. Watkins***, C F.3d C, 1999 WL 374114 (6<sup>th</sup> Cir. 1999).

A search warrant issued for a specific residence on Keith Louis' property where Watkins lived. However, the warrant failed to identify a second uninhabited residence on the Louis property. Nonetheless, law enforcement officers searched the uninhabited dwelling and found cocaine powder and crack. The affidavit detailing alleged illegal activity observed by an informant contained observations of illegal activity in the house in which Watkins lived, but it contained no information about any illegal activity occurring at the uninhabited dwelling. Watkins moved to suppress the fruits of the search and seizure of the uninhabited dwelling and the district court denied the motion.

The test for determining whether the description in the warrant is sufficient to satisfy the particularity requirement of the 4<sup>th</sup> Amendment is whether the description is such that the officers with a search warrant can, with reasonable effort, ascertain and identify the place intended. In this case, the warrant failed to describe the uninhabited dwelling at all and the affidavit, which did describe the dwelling with sufficient particularity, was not incorporated into the warrant.

uninhabited dwelling, it was reasonable for the officer to believe that the warrant incorporated the affidavit. The Court then found that the agents could not, in reasonable good faith, believe that there was probable cause to

search the uninhabited house based on the warrant and affidavit. However, there was no evidence that the agents gave a knowingly false affidavit or acted in bad faith. Moreover, the warrant was issued by the proper authority; there was no evidence that the issuing magistrate abandoned his neutral judicial role; and the agents had probable cause to believe that Watkins had committed a crime. In short, a reasonably well-trained officer executing the warrant would not have known that the search was illegal.

Consequently, the Court concluded that even though the search warrant neither described the uninhabited house with particularity nor contained probable cause to search the uninhabited house; the evidence seized during the search was admissible pursuant to the good-faith exception articulated in *United States v. Leon*, 468 U.S. 897 (1984).

Watkins also moved the district court to depart from his Guideline range based on his diminished capacity to commit the offense and sentencing entrapment. The district court declined Watkins' invitation to depart from the otherwise applicable Guideline range. The 6<sup>th</sup> Circuit found that there were insufficient facts in the record to support the departure. A district court's failure to depart from the Guidelines range is not cognizable on appeal under 18 U.S.C. § 3742(a) when the district court properly computes the Guidelines range, imposes a sentence that is not illegal or did not result from an incorrect application of the Guidelines range, and is not unaware that it had discretion to depart from the Guidelines range.®

***Mustata v. United States Department of Justice***, C F.3d C, 1999 WL 393652 (6<sup>th</sup> Cir. 1999).

Marian and Lenuta Mustata sought asylum in the United States. The INS concluded that the Mustatas' claim of persecution in Romania was without merit and their application for asylum was denied. The Mustatas withdrew their asylum application and agreed to voluntarily depart the United States. However, prior to voluntarily leaving the United States, the Mustatas filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2241 asserting a claim of ineffective assistance of counsel during their administrative immigration proceedings. The Mustatas asserted that their counsel failed to investigate their grounds for asylum and failed to present evidence supporting their asylum claim.

The district court concluded that under 8 U.S.C. § 1252(g), it did not have jurisdiction to consider the petition. The Mustatas appealed and the 6<sup>th</sup> Circuit held that § 1252(g) did not eliminate jurisdiction over the

Forman was an attorney in the Tax Division of the Justice Department in Washington, D.C. The United States Attorney for the Eastern District of Michigan sent a case file to the Tax Division for review in order to

Mustatas' § 2241 claim because their petition contained an allegation that their counsel's ineffective performance resulted in a deportation order that was entered against them without due process. Accordingly, the district court's order dismissing the petition was reversed.

***United States v. Walker***, CF.3dC, 1999 WL 407527 (6<sup>th</sup> Cir. 1999).

During the execution of a search warrant, law-enforcement officers, in an effort to secure the area to be searched and to protect themselves, patted-down every individual found on the premises. During the pat-down of Walker, an officer felt an object bulging in his pants which the officer immediately recognized as a packaged controlled substance. The object was removed and determined to be crack. A day later, a search warrant was executed at Walker's home where an additional quantity of crack and drug paraphernalia was located.

Walker was indicted for possession with intent to distribute crack and he filed a motion to suppress physical evidence which the district court denied. A jury convicted Walker of the indictment and he was found to be a career offender and sentenced to serve a 36 year term of imprisonment.

On appeal, Walker argued that *Terry v. Ohio*, 392 U.S. 1 (1968) did not permit an officer to conduct a warrantless frisk for weapons and seize an object that he recognized as narcotics and not a weapon. The 6<sup>th</sup> Circuit held that the pat-down search of Walker was lawful. Where the officer, while performing a *Terry* pat-down for weapons, feels something that his experience tells him is narcotics, the pat-down provides probable cause to justify a warrantless seizure of drugs. Therefore, the district court's order denying Walker's motion to suppress was affirmed.

Also on appeal, Walker argued that his state court conviction for solicitation to commit aggravated robbery was not an offense of violence for career offender purposes. To resolve this issue, the Court employed a categorical approach which requires it to examine the statutory elements of the conviction to determine if it is a crime of violence. Under a categorical approach, the specific underlying facts regarding the offense are irrelevant to a sentencing court's determination.® The Court found that Walker's Tennessee conviction for solicitation to commit aggravated robbery was a crime of violence because Walker's conduct presented a serious potential risk of physical injury to another.®

***United States v. Forman***, CF.3dC, 1999 WL 402240 (6<sup>th</sup> Cir. 1999).

secure approval for a mafia prosecution against Mr. Giacalone, et. al. Forman's office-mate received and reviewed the file. However, seven months after the file was forwarded to Washington, a search warrant was

executed at Giacolone's office and a copy case file was found therein.

In an effort to determine how the file came into the possession of Giacolone, the file was processed and Forman's fingerprints were discovered on some of the pages. Forman admitted providing the file to Giacolone, but claimed that he acted under duress. Forman was indicted for obstruction of justice and criminal contempt. A jury acquitted Forman of the obstruction but convicted him of contempt. The 6<sup>th</sup> Circuit reversed the contempt conviction.

The government then indicted Forman for theft of government property and he moved to dismiss the indictment alleging that the second indictment violated the Double Jeopardy Clause. The district court denied this motion and Forman appealed.

Double jeopardy challenges are evaluated under the same elements test. This test requires courts to determine whether each offense contains an element not contained in the other. A defendant will be considered placed in double jeopardy only if every violation of one statute entails a violation of another. The Court found that the elements of the theft charge were not subsumed by either the contempt or obstruction charges. Therefore, even though the new prosecution was a successive prosecution based on the same conduct, Forman was not placed in double jeopardy.

*United States v. Payne*, CF.3dC, 1999 WL 409384 (6<sup>th</sup> Cir. 1999).

Payne was a Kentucky parolee who was subject to the maximum level of parole supervision because of his prior record. After meeting with his parole officer on one occasion, Payne absconded from supervision and moved to a different area of the State. A Kentucky State Police detective obtained information that Payne was in possession of a large quantity of methamphetamine in the trunk of his car. However, additional evidence was not developed to justify a search of the vehicle.

Approximately 45 days later, Payne's parole officer obtained an arrest warrant based on Payne's parole violation. In an effort to arrest Payne, the parole officers requested assistance from the Kentucky State Police detective who had previously received information about Payne's methamphetamine activities. The parole officers informed the detective that they intended to do a plain view search of the trailer where Payne would be located. The detective viewed this as an opportunity to have a

The tip provided to the Kentucky State Police detective about Payne's possession of methamphetamine 45 days before the search did not provide reasonable suspicion because it lacked traditional indicia of reliability and it was stale. The tip was anonymous, lacked detail, and failed to predict any future events that could be monitored to provide corroboration. Further

parole officer basically help him get in Mr. Payne's trailer.

During the execution of the arrest warrant, Payne was found in the trailer and after he was arrested, the officers felt that their safety was assured. Nonetheless, after Payne was placed in a cruiser, a parole officer entered the trailer to conduct a plain view search during which he discovered a marijuana cigarette in an ashtray in the bedroom.

Another parole officer searched Payne's truck because this officer felt he had authority to search the person and homes of parolees at any time. A marijuana cigarette, a roach clip, rolling papers, shot gun shells, and scales were found in the truck.

The parole officers then left the scene with Payne and the police officers attempted to secure a search warrant for the truck and trailer based on the discovery of the marijuana cigarettes and scales. While the search warrant was being secured, another police officer permitted Payne's children to use the bathroom but only after their mother produced cash, a handgun, and methamphetamine. After the search warrant was secured, a thorough search of the trailer yielded an assault rifle and gun paraphernalia.

Payne was charged with possession with intent to distribute methamphetamine, possession of marijuana, and being a felon in possession of a firearm. The district court denied Payne's motion to suppress holding that the initial searches were supported by reasonable suspicion. Payne was acquitted of the methamphetamine charge but convicted of the marijuana and firearms charges.

In Kentucky, a parole officer is authorized to search the person and property of a parolee, without a warrant, upon reasonable suspicion that the parolee is in possession of contraband. Reasonable suspicion is defined as less stringent a standard than probable cause, reasonable suspicion requires that the authority acting be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant a belief that a condition of probation or parole has been or is being violated.

Because of the special needs of the parole system, the Court found that a warrantless search, based on reasonable suspicion, was reasonable under the 4<sup>th</sup> Amendment. However, the Court held that if the parole officers lack reasonable suspicion to support the search, the fruits of the search must be suppressed.

evidence of the unreliability of the tip was that the methamphetamine was to be located in the trunk of Payne's car when it was clear that Payne always drove a truck and never a car.

The Court found that the evidence was not properly seized under the plain view doctrine because, without reasonable suspicion, there was never a

justification for the officers to be in the places from which they observed the incriminating items. Finally, the Court found that Payne's wife's revelation of contraband was improperly induced by the continuing police presence in the trailer. Because the search warrant was obtained on the basis of illegally seized evidence, all later discoveries were found to be inadmissible. Therefore, the district court's order denying Payne's motion to suppress physical evidence was reversed.

**United States v. Martinez**, CF.3dC, 1999 WL 414379 (6<sup>th</sup> Cir. 1999).

Martinez was indicted and convicted for conspiracy to possess with intent to distribute heroin and the distribution of heroin. The presentence report recommended a 3 level enhancement to Martinez's offense level for his role in the offense as a manager or supervisor in criminal activity involving 5 or more participants. Martinez objected to the enhancement and the district court found that the evidence did not support a finding that 5 or more participants were involved. However, the court imposed a 2 level role enhancement pursuant to USSG ' 3B1.1(c).

Martinez argued that he was ineligible for the enhancement because he was only a middleman between the Colombian supplier and the supplier's distributors. The 6<sup>th</sup> Circuit found that the crucial question in determining whether the enhancement provision of ' 3B1.1 applies is whether the defendant exercised control over other conspirators. The Court found that Martinez recruited accomplices to collect money for him in New Jersey and he also implemented a complicated procedure of wire transfers for the collection of heroin debts. Furthermore, Martinez exercised decision-making authority and his role was integral to the commission of the offense. Therefore, the two level enhancement was affirmed.

**In re: Gregory**, CF.3dC, 1999 WL 409088 (6<sup>th</sup> Cir. 1999).

Gregory was convicted of a federal drug offense in Arkansas and his conviction and sentence were affirmed by the 8<sup>th</sup> Circuit. Gregory filed a motion to vacate his sentence pursuant to 28 U.S.C. ' 2255 and the district court denied the motion. Because Gregory was incarcerated in Tennessee, he then filed a petition for a writ of *habeas corpus* in the Western District of Tennessee pursuant to 28 U.S.C. ' 2241.

The district court construed the petition to be a successive motion to vacate his sentence and the case was transferred to the 8<sup>th</sup> Circuit so that Court could determine the propriety of the motion. Gregory then filed

A remedy under ' 2255 is not considered inadequate or ineffective because: relief has already been denied; the petitioner is procedurally barred from pursuing relief under ' 2255; or the petitioner has been

a petition for mandamus relief in the 6<sup>th</sup> Circuit in which he alleged that he had a right to file a *habeas* action pursuant to ' 2241 because an adequate remedy was not available under ' 2255.

The 6<sup>th</sup> Circuit found that a ' 2255 motion must be filed in the district court that imposed sentence whereas a petition for *habeas corpus* relief filed pursuant to ' 2241 may be filed in the district court having jurisdiction over the petitioner's custodian. A ' 2255 motion provides a post-conviction means for a federal inmate to attack his conviction and sentence. However, a ' 2241 petition cannot be used to seek the same relief provided by a ' 2255 motion unless the remedy provided by ' 2255 is inadequate or ineffective to test the legality of his detention.® The petitioner bears the burden of showing that the remedy afforded under ' 2255 is inadequate or ineffective.

For inmates who want to file a second or successive ' 2255, they must file a motion with the court of appeals seeking permission to file the motion in the district court. If the successive action is proper under the AEDPA's gatekeeping provision, permission to file a motion in the district court will be granted.

The 6<sup>th</sup> Circuit found that it had no jurisdiction to grant mandamus relief to Gregory as he did not make the requisite showing that ' 2255 provided an inadequate or ineffective® remedy. Accordingly, the case was transferred to the 8<sup>th</sup> Circuit to determine if Gregory's second or successive petition was proper.

**Charles v. Chandler**, CF.3dC, 1999 WL 402229(6th Cir. 1999).

Charles pled guilty to conspiracy to possess with intent to distribute marijuana and was sentenced to serve 78 months in prison and the 6<sup>th</sup> Circuit affirmed both the conviction and sentence. Charles then filed a ' 2255 motion in which he challenged the voluntariness of his plea and claimed that he received ineffective assistance of counsel. The district court denied this motion and both the district court and the 6<sup>th</sup> Circuit refused to issue a certificate of appealability.

Charles then filed a ' 2241 *habeas corpus* petition in which he raised the same claims that were previously raised in the ' 2255 motion. The district court dismissed the petition because Charles failed to establish that he had an inadequate remedy under ' 2255. The case was then transferred to the 6<sup>th</sup> Circuit so the Court could consider the ' 2241 petition as an application to file a successive ' 2255 motion.

denied permission to file a second or successive ' 2255. Moreover, the remedy afforded under ' 2241 is not additional, alternative, or supplemental to the remedy prescribed under ' 2255.

The Court found that a post-AEDPA petitioner will not be permitted to utilize ' 2241, through the savings clause found in ' 2255, as a means of circumscribing the restriction on the filing of second or successive *habeas* petitions. The Court adopted the 1<sup>st</sup> Circuit's approach to this problem and summarized it as follows: AThere is only one bite at the post-conviction apple unless a second or successive petition can show one of two things: a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or newly discovered evidence sufficient to establish by clear and convincing evidence, on the whole record, that no reasonable factfinder would have returned a guilty verdict. A claim of actual innocenceCdefined as factual innocence, not mere legal insufficiencyC will have a mechanism for review.@

Therefore, the Court found that the district court properly denied Charles's *habeas* relief. Moreover, the Court found that Charles failed to make the requisite showing that would permit the Court to issue an order permitting him to file a second or successive ' 2255 motion. Charles failed to submit any newly discovered evidence to show clearly or convincingly that he was innocent of his crime and he did not rely on any intervening Supreme Court decision for relief.

***United States v. Smith***, C F.3d C, 1999 WL 427401 (6<sup>th</sup> Cir. 1999).

Smith was convicted of a Hobbs Act robbery; six counts of carrying or using a firearm during and in relation to a crime of violence (' 924(c)); and being a felon in possession of a firearm. Smith was acquitted of ten Hobbs Act robberies; two attempted robberies; and seven ' 924(c) violations. All of the stores that Smith was alleged to have robbed sold significant amounts of beer, wine, and cigarettes and all of these products were transported into Michigan for resale.

On appeal, Smith argued that the government failed to establish that the robberies had a Asubstantial effect@on interstate commerce. However, the 6<sup>th</sup> Circuit concluded that even after *United States v. Lopez*, 514 U.S. 549 (1995), the Hobbs Act only requires that the robbery in question had a *Ade minimus*@ effect on interstate commerce. By proving that the store Smith robbed did substantial business in beer, wine, and tobacco products which were not produced in Michigan, the government met its burden. Even though Smith was convicted of only one Hobbs Act robbery, he was also convicted of six ' 924(c) violations. On appeal, Smith argued that the district court lost jurisdiction over five of the ' 924(c) convictions after he was acquitted of

Finally, Turner sought to litigate the constitutionality of his prior convictions. However, in *Custis v. United States*, 511 U.S. 485 (1994), the Court

the predicate robberies. The 6<sup>th</sup> Circuit analyzed the language of

' 924(c) and concluded that the statute only requires the defendant to have Acommitted a violent crime for which he may be prosecuted in federal court.@ The statute neither requires the government to charge a violent crime nor convict the defendant of a violent crime in order for the sentencing court to have jurisdiction pursuant to ' 924(c).

***Turner v. United States***, C F.3d C, 1999 WL 446554 (6<sup>th</sup> Cir. 1999).

In 1991, Turner was convicted of being a felon in possession of a firearm and his sentence was enhanced pursuant to the Armed Career Criminal Act. Turner's conviction was affirmed on appeal after which he filed a ' 2255 motion challenging various aspects of his conviction. At trial, Turner attempted to stipulate that he was a convicted felon to prevent the government from introducing the details of his prior convictions. However, the district court refused Turner's stipulation and permitted the government to introduce evidence about the name and nature of the prior convictions.

In *Old Chief v. United States*, 519 U.S. 172 (1997), the Court held that where the Aname or nature of the prior offense raises a risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of a prior conviction, it is an abuse of discretion for the district court to refuse the defendant's offer of stipulation.@ The 6<sup>th</sup> Circuit found that because *Old Chief* announced a new rule of criminal procedure, the rule was not to be applied retroactively on collateral review. Because Turner's conviction occurred in 1991 and *Old Chief* was not decided until 1997, the decision could not be used to collaterally attack his conviction.

Turner also claimed that his trial counsel was ineffective by failing to present sufficient exculpatory evidence at trial. However, Turner did not allege a factual question regarding the effectiveness of his trial counsel. Instead, Turner merely alleged that he was factually innocent of the crimes for which he was convicted. Turner claimed that the district court erred by denying his ' 2255 motion without conducting an evidentiary hearing. The 6<sup>th</sup> Circuit concluded that a defendant must be afforded an evidentiary hearing only when there is a Afactual dispute in order to determine the truth of the petitioner's claims.@ In this case, Turner's pleadings did not raise a factual dispute.

held that the federal sentencing forum Awas not the proper forum for a constitutional challenge to a prior conviction used to enhance a sentence.@ The 6<sup>th</sup> Circuit found that

Turner must challenge the state conviction in state court or in an independent *habeas corpus* proceeding pursuant to ' 2254.

**Wright v. United States**, C F.3d C, 1999 WL 427427 (6<sup>th</sup> Cir. 1999).

Wright was convicted of drug and firearm offenses and sentenced to serve 535 months in prison and the 6<sup>th</sup> Circuit affirmed the conviction and sentence on direct appeal. Wright then filed a ' 2255 motion which the district court denied in part and Wright appealed. In order to prevail on his ' 2255 motion, Wright must show a fundamental defect in his sentencing which necessarily results in a complete miscarriage of justice or an egregious error violative of due process.

Wright argued that the district court erred in determining that the government proved that he used or carried a firearm in violation of ' 924(c). In *Bailey v. United States*, 516 U.S. 137 (1995), the Court held that in order to prove use, the government must prove that the defendant actively employed a firearm during and in relation to the predicate crime. In *Bailey*, the Court also found that an offender carries a firearm when he keeps a gun hidden in his clothing throughout a drug transaction. However, a defendant cannot be charged with violating ' 924(c)(1) for merely storing a weapon near drugs or drug proceeds.

To establish the firearm was carried in relation to a drug trafficking offense, the government must prove that the firearm furthered the purpose or effect of the crime and that its presence or involvement was not the result of coincidence. By applying these concepts, the Court found that Wright did not either personally use or carry a firearm. However, the evidence did establish that Wright aided and abetted a co-defendant's carry or use of a firearm because the government proved that Wright, as an accomplice, associated and participated in the use of the firearm in connection with the underlying drug crime. To establish aiding and abetting liability for a ' 924(c) prosecution, the government must prove more than that the defendant knew one of his co-conspirators carried a firearm. Instead, there must be proof that the aider and abettor performed some affirmative act relating to that firearm.

Wright also argued that his appellate counsel was ineffective by challenging neither the role enhancement that he was given pursuant to USSC

Although the Court employs a totality of the circumstances test in evaluating whether an informant's tip establishes probable cause, two relevant considerations are the informant's veracity and basis of knowledge. The 6<sup>th</sup> Circuit's review is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. The 6<sup>th</sup> Circuit found that the district court erred by interpreting the affidavit in a

' 3B1.1(a) nor the relevant conduct determination concerning drug quantity. The Court found that appellate counsel is not ineffective simply because he fails to raise every possible argument on appeal. The 6<sup>th</sup> Circuit found that there was ample evidence to support the role enhancement that Wright received as well as the relevant conduct determination made by the district court.

Finally, Wright also argued that the government failed to prove the substance that he was charged with possessing and distributing was crack cocaine. The Court found that the government bears the burden of proving, by a preponderance of the evidence, the type of drug that the defendant is charged with distributing. The Court found that there was sufficient evidence in the record to support the conclusion that the drug was crack cocaine.

**United States v. Smith**, C F.3d C, 1999 WL 435128 (6<sup>th</sup> Cir. 1999).

A search warrant was executed on Smith's house which led to the seizure of crack and two firearms. After being mirandized, Smith gave a written confession admitting ownership of the guns and drugs. Smith was charged with possession with intent to distribute crack and being a felon in possession of a firearm.

Smith filed motions to suppress physical evidence as well as the statements that he made after the search warrant was executed. Smith's motion to suppress physical evidence was granted after the district court concluded that the affidavit was insufficient to establish probable cause and that the good faith exception of *Leon* did not apply. The court held that even though the tips about the weapons came from an informant of known reliability, the warrant lacked the explicitness of detail to establish probable cause. The government appealed this decision.

Probable cause is defined as a reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion. This standard requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity. The supporting facts in the affidavit can be based on hearsay information supplied by an informant and do not need to be personally observed by the affiant.

Ahypertechnical rather than a common sense manner. In applying the totality of the circumstances test, the 6<sup>th</sup> Circuit will evaluate the reliability or veracity of the informant, the sufficiency of the subsequent corroboration of the tip, and the sufficiency of the affidavit's statement about the underlying circumstances from which the informant concluded the illegal weapons would be found in the defendant's home. The Court found that the

affidavit contained sufficient statements indicating why the affiant concluded that the informant was credible and that the information that he provided was reliable. Because the informant had a prior track record of unusual reliability, his veracity was sufficiently substantiated.

When an informant has a proven track record for providing reliable information, corroboration of the information he provides is not necessarily essential, as long as there is sufficient indication of his basis of knowledge for concluding that contraband or evidence of a crime will be found in a particular place. In this case, the affidavit indicated that the informant had seen Smith with firearms within the last 48 hours. The informant's basis of knowledge was first-hand and there was no need for the informant to speculate further about whether a crime was being committed because mere possession of a firearm by a felon constitutes a felony offense. Finally, the officers verified that Smith was a convicted felon and thus was not entitled to possess a firearm.

The Court also found that the affidavit adequately set forth the informant's basis of knowledge. The affidavit provided that the informant personally observed most of the illegal activity recounted therein. In conclusion, the Court held that the district court erred in finding that the affidavit did not contain sufficient facts of an incriminating nature and a sufficient basis for concluding that probable cause existed regarding criminal activity. Corroboration and an explicit detailed description of wrongdoing are not automatic requirements for establishing probable cause, but are only two factors to be considered under the *Gates* totality of the circumstances test. The totality of the circumstances test requires a balanced assessment of the relative weights of all the various indicia of reliability.

***United States v. Gatewood*, CF.3dC, 1999 WL 453947 (6<sup>th</sup> Cir. 1999).**

Gatewood was indicted for kidnapping 2 women in Memphis and transporting them to Arkansas where he robbed them. Two nights later, Gatewood robbed a Memphis Motel at gunpoint. When Gatewood was arrested, he confessed to the crimes and was convicted by a jury. Gatewood was sentenced to life-imprisonment under the 3-strikes statute (18 U.S.C. § 3559(c)) because he was convicted of a serious violent felony and he had at least 2 prior convictions that were serious violent felonies. Gatewood was convicted of armed robbery in 1971 and aggravated robbery in 1976. The term serious violent felony includes robbery, but under the statute, a prior felony robbery conviction does not serve as a strike if a defendant can prove by clear and convincing evidence that it was non-qualifying.

Although Gatewood argued that his convictions

did not qualify as strikes, he provided no proof that they were non-qualifying. Instead, Gatewood alleged that he could not locate witnesses who recalled the circumstances surrounding the crimes. The record revealed that Gatewood's 1976 aggravated robbery conviction may not qualify as a strike under § 3559. Nonetheless, the district court found that both robbery convictions were qualifying because Gatewood did not sustain his burden of proof.

On appeal, Gatewood claimed that his sentence was unconstitutional because § 3559 improperly placed a heightened burden of proof on defendants to show that previous robbery convictions were non-qualifying felonies. The Court found that there is no constitutional impediment to assigning the burden of proof to the defendant at the sentencing stage. However, the Court found that the assignment of a clear and convincing evidence burden to the defendant to prove that the convictions were non-qualifying violated the Due Process Clause.

The Court found that it may be simply impossible to be clear and convincing about facts for offenses that occurred 20 years ago. It is therefore probable in many cases that a defendant may have enough evidence to prove that a previous felony is more likely than not qualifying yet not enough evidence to satisfy the clear and convincing standard. For such a defendant whose previous felony is in truth non-qualifying, the consequences of an erroneous decision are rarely higher in the federal system, i.e. life imprisonment.

Therefore, the Court essentially re-wrote § 3559(c)(3)(A) so that the clear and convincing evidence standard was omitted. Because Gatewood had previously alleged that his prior convictions were non-qualifying, on remand, the Court stated that the government will now have the burden of proving that the defendant's robbery convictions were not non-qualifying by a preponderance of the evidence.

The Court rejected Gatewood's claim that the 3-strikes statute violated the Equal Protection Clause because it affords the prosecutor discretion in selecting cases in which life imprisonment is sought.

***United States v. Walker*, C F.3dC, 1999 WL 459982 (6<sup>th</sup> Cir. 1999).**

Walker pled guilty to conspiracy to distribute cocaine and was permitted to remain on bond while awaiting sentencing. Two months after pleading guilty, Walker submitted a urine specimen that was positive for cocaine. Based on the dirty urine specimen, the probation officer did not reduce Walker's offense level for acceptance of responsibility pursuant to USSC § 3E1.1.



At his sentencing hearing, Walker testified that drugs were in his urine sample because of prescribed medication that he took following root canal surgery. The district court found that Walker used cocaine while on bond and that he lied about it under oath at the sentencing hearing. Therefore, Walker was denied an acceptance of responsibility reduction and his offense level was enhanced for obstruction of justice pursuant to USSG ' 3C1.1.

On appeal, Walker argued that the district court should not have considered his cocaine use as evidence of his failure to accept responsibility for the cocaine conspiracy. The Sixth Circuit rejected this argument and found that Walker's dirty urine evidenced his continued involvement with cocaine. Accordingly, Walker's positive drug screen demonstrated his failure to accept responsibility for his criminal conduct and the district court's refusal to award Walker an acceptance of responsibility reduction was not clearly erroneous.

*United States v. Jeter*, CF.3dC, 1999 WL 476993 (6<sup>th</sup> Cir. 1999).

In 1996, Jeter was indicted by a state grand jury for procuring fraudulent loans and while under indictment he continued to violate this same state statute. After Jeter completed his state crime spree, he was indicted by the federal grand jury for various fraud activities and he pled guilty pursuant to a plea agreement. In the plea agreement, the government agreed to not oppose Jeter's request for a 3 level acceptance of responsibility reduction pursuant to USSG ' 3E1.1.

The probation office refused to recommend an acceptance of responsibility reduction because after Jeter was indicted on the state charges, but before he was indicted by the federal grand jury, he engaged in similar conduct by violating the pertinent state statute. Jeter admitted that he continued to engage in similar criminal conduct after his indictment in state court. Nonetheless, Jeter argued that he was entitled to an acceptance of responsibility reduction because he did not continue to engage in criminal conduct after his indictment and guilty plea in federal court.

The district court refused to reduce Jeter's offense level for acceptance of responsibility because it viewed his continued violation of the state statute after indictment as inconsistent with acceptance of responsibility. The 6<sup>th</sup> Circuit found that the Guidelines do not answer the question of whether a district court is permitted to consider criminal conduct that precedes a defendant's guilty plea in evaluating the genuineness of the defendant's verbal acceptance of responsibility at a later time.

However, the Court concluded that the

In an unpublished decision, the Dillon panel, relying on *United States v. Webb*, 157 F.3d 451 (6<sup>th</sup> Cir.

Voluntary termination from criminal conduct is one of the 8 factors that ' 3E1.1 permits courts to consider in assessing whether a defendant is entitled to an acceptance of responsibility reduction. The inclusion of this factor evidences the Guidelines' intent that the district court should have the power to determine whether a defendant's actions speak louder than his words. The Court concluded that in determining whether a defendant is entitled to an acceptance of responsibility reduction, the court must consider the 8 factors found in ' 3E1.1 as well as any other factor it deems to be relevant. In this case, the 6<sup>th</sup> Circuit found that the district court did not improperly apply the Guidelines.

*United States v. Monger*, CF.3dC, 1999 WL 511976 (6<sup>th</sup> Cir. 1999).

Monger was indicted for possession with intent to distribute more than 5 grams of crack and the jury was properly instructed on this offense. However, the district court refused Monger's request for an instruction on the lesser offense of simple possession in violation of 21 U.S.C. ' 844.

The Sixth Circuit held that a lesser included offense instruction should be given when: 1.) a proper request is made; 2.) the elements of the lesser offense are identical to part of the elements of the greater offense; 3.) the evidence would support a conviction for the lesser offense; and 4.) the proof on the element or elements differentiating the 2 crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser.

The Court concluded that Monger properly and timely requested the instruction and simple possession is a lesser included offense of possession with intent to distribute. The 6<sup>th</sup> Circuit found that the district court abused its discretion in determining that there was inadequate evidence to support a conviction on the lesser offense. Moreover, the element differentiating the 2 crimes, intent to distribute, was sufficiently disputed to enable a jury to acquit on the greater offense and convict on the lesser.

In this case, there was no direct evidence that Monger actually distributed crack. Moreover, there was not sufficient circumstantial evidence to support this conclusion. The Court found that the district court's failure to instruct the jury on the lesser included offense was not an error that could be subjected to a harmless error analysis. Instead, this error was a structural error requiring reversal since it was intrinsically harmful.

*Dillon v. United States*, CF.3dC, 1999 WL 511697 (6<sup>th</sup> Cir. 1999).

1998), voted to dismiss his appeal for lack of jurisdiction. This decision was predicated on the fact that the notice

of appeal failed, as specified by Fed. R. App. P. 3(c)(1)(C), to name the court to which the appeal is taken. In an *en banc* decision, the 6<sup>th</sup> Circuit held that the requirements of Rule 3(c) are jurisdictional. Therefore, a notice of appeal must explicitly name the court to which an appeal is taken when there is more than one potential appellate forum available to the appellant. However, where only one avenue of appeal exists, Rule 3(c)(1)(C) is satisfied even if the notice of appeal does not name the appellate court.

In this case, Dillon was appealing a denial of a '2255 motion. Since the only appellate court available to Dillon was the 6<sup>th</sup> Circuit, his notice of appeal was not defective.

***United States v. Ford*, C F.3d C, 1999 WL 528933 (6<sup>th</sup> Cir. 1999).**

Don Ford owned a business that conducted bingo games for the benefit of charities. Under Kentucky law, it is illegal to promote gambling (including bingo) other than as charitable gaming. Gambling could only be legal charitable gaming if: it was operated by a tax exempt organization; that organization had maintained tax exempt status for five years before the gaming; the gaming was conducted exclusively by unpaid volunteers for the charity; and the proceeds were used solely for the charitable purposes of the organization.

Ford first operated a bingo business in Louisville in 1990 and conducted games for various charities. Instead of using volunteers from the sponsoring charities to run the games in accordance with Kentucky law, Ford hired workers who were paid from money skimmed from the proceeds. The skim was given to Don's wife, Sandra, who then paid the workers in cash. Any money left over after the skim was paid was kept by the Fords.

In 1991, Ford re-activated a lapsed post of the Regular Veterans Association (RVA) and operated it as his own charitable sponsor. Workers testified that the RVA sponsored Bingo games and that workers were expected to join the RVA. After the RVA was re-activated, the method of paying non-RVA charitable sponsors changed. Under the new arrangement, the non-RVA charities received a flat fee which resulted in the bingo business making more money but the charities making less.

A search warrant issued under state law was executed on the business and Don and Sandra were subsequently indicted for operating a gambling business in violation of state law (18 U.S.C. ' 1955) and money laundering (18 U.S.C. ' 1956 and 1957). Don was also indicted for tax evasion for conduct unrelated to the

The Fords then argued that the evidence seized pursuant to the warrant should also have been suppressed in the gambling and money laundering trial. The Fords

bingo operation. During the search of the bingo business, files were seized that were generated as a result of Don's sale of land and this served as the factual basis for the tax evasion indictment.

The search warrant contained 10 clauses listing items to be seized and a review of those clauses revealed that they addressed gambling activities but not tax evasion. The district court found that the search was reasonable under the 4<sup>th</sup> Amendment. Don was convicted of money laundering, tax evasion and gambling while Sandra was convicted of gambling and money laundering.

On appeal, Don argued that the search of the bingo business violated his 4<sup>th</sup> Amendment rights because the warrant was not sufficiently particular and the federal agents improperly took advantage of a search conducted under a state warrant. The particularity requirement of the 4<sup>th</sup> Amendment prohibits the issuance of warrants that would let officers seize one thing under a warrant describing another. A general order to explore and rummage through a person's belongings is not permitted.®

The Court found that the language in the warrant authorized a broader search than was reasonable given the facts contained in the affidavit. There was no indication in the affidavit of Don's involvement in criminal activity prior to 1991. However, records that were seized pertaining to the real estate transaction were clearly delineated as transactions that occurred between 1984 and 1988. The Court found that the failure to limit broad descriptive terms by relevant dates, when such dates are available to police will render a warrant overbroad.

The government argued that even if the warrant was overbroad, the documents relating to the tax offense would have inevitably been discovered because at the time that the warrant was executed, the IRS had a pending civil investigation of Don's 1988 tax return. Under the inevitable discovery doctrine, illegally seized evidence may be admissible despite the exclusionary rule if the government can prove that it would have obtained the evidence from lawful sources even if the seizure never occurred.® However, the Sixth Circuit found that even though there was a civil investigation of Don's 1988 tax return pending when the search warrant was executed, the government failed to carry its burden of proving the inevitability of the discovery. Moreover, because the government failed to argue the applicability of the good faith exception to the warrant requirement, the Court found that the issue was waived and reversed Don's tax evasion conviction.

argued that because the warrant was overbroad, all the evidence seized under it should be suppressed. The Court found that the remedy for an overbroad warrant

was to sever the overbroad portions from the sections that were sufficiently particular. Based on this analysis, the seizure of documents pertaining to gambling and money laundering activities was authorized.

Because the warrant was issued by a state court, the Fords also argued that federal agents were not permitted to *Atag along* with the state authorities while they executed the state warrant. The Court rejected this proposition and found that federal officers are not prohibited from being present during the execution of a state warrant. However, even though federal agents are permitted to *Atag along* during the execution of a state warrant, the federal agents are not permitted to use a warrant describing one kind of evidence as a pretext for searching for evidence outside the scope of the warrant.

In the case *sub judice*, the documents pertaining to gambling and money laundering were seized by state officers using a state warrant that adequately described Don's gambling activities. Accordingly, the documents were properly admitted with respect to the gambling and money laundering cases.

The Fords also challenged the sufficiency of the evidence for their convictions under ' ' 1956 and 1957.

The Fords argued that proof of a transaction with a federally insured bank does not satisfy the government's burden of proving *Aa* transaction with the bank whose activities affected interstate commerce. The Sixth Circuit rejected this argument and concluded that because the government proved that the Fords used a federally insured bank, a sufficient nexus to interstate commerce was established.

At sentencing, the district court calculated the offense level using USSG ' 2S1.2. The Fords argued that their offenses fell outside the *Aheartland* of ' 2S1.2 because a transaction in gambling proceeds is atypical of the money laundering statutes. The Fords argued that the thrust of ' 2S1.2 was to punish money laundering resulting from serious underlying criminal conduct such as drug trafficking and organized crime. The district court found that the Fords' offenses were not outside of the heartland and refused to depart from the otherwise applicable guideline range.

Ordinarily, a district court's decision not to depart is not reviewable by a court of appeals. However, if the district court's refusal to depart stems from its legal conclusion that the circumstances argued by the defendant was not a valid reason for departure, the decision is reviewable. In this case, the 6<sup>th</sup> Circuit found that the inclusion of gambling offenses as a specified unlawful activity within the money laundering statute showed conclusively that a money laundering offense was not outside the heartland merely because it involves gambling proceeds rather than drug or organized crime

Robert Long, a co-defendant of Mark Ross, was

proceeds. Accordingly, the district court's decision to deny the Fords' motion for a downward departure was affirmed.

*United States v. Ross*, C F.3d C, 1999 WL 548045 (6<sup>th</sup> Cir. 1999).

Mark Ross, an attorney, was convicted of conspiracy to distribute and possession with intent to distribute cocaine, conspiracy to commit money laundering, and two counts of money laundering. Although there was no evidence that Ross directly participated in the cocaine distribution business of Robert Long, Ross admitted that he knew that Long was involved in the drug business and that he even received small quantities of cocaine from Long on several occasions.

On appeal, Ross challenged the sufficiency of the evidence on the conspiracy convictions. The 6<sup>th</sup> Circuit found that the essential elements of the crime of conspiracy are: a alleged conspiracy existed; the defendant wilfully became a member; and one of the conspirators knowingly committed at least one overt act in furtherance of the object of the conspiracy. The Court found that there was overwhelming evidence as to the existence of the conspiracies alleged in the indictment. Furthermore, the Court held that the government was not obligated to prove that Ross participated in all aspects of the conspiracies. Instead, the government only needed to prove that Ross was a party to the general conspiratorial agreements.

Ross argued that he merely supplied legal services that were used by an illicit operation. The Court found that *Aone* does not become a party to a conspiracy merely by supplying goods that he knows the buyer will use illegally unless he also knows of the conspiracy. The Court found that Ross knew of the money laundering and drug conspiracies and joined them by engaging in the laundering of drug proceeds.

Money laundering alone is not sufficient to link a person who launders money with a conspiracy to violate drug laws. The government must also demonstrate a sufficient link between a defendant's money laundering and the drug distribution conspiracy in order to prove that the defendant was part of the drug conspiracy. In summary, the Court held that there was sufficient evidence to support Ross' conviction for conspiracy to commit money laundering. Furthermore, there was sufficient evidence to establish the necessary *Alink* between Ross' money laundering activities and the drug conspiracy in order to support his conviction for the drug conspiracy.

*United States v. Long*, C F.3d C, 1999 FED App. 0274P (6<sup>th</sup> Cir. 1999).

convicted of a myriad of drug charges including operating

a Continuing Criminal Enterprise (CCE). Long challenged the sufficiency of the evidence for the CCE conviction. In order to sustain a conviction for engaging in a CCE, the government must prove: (1) a felony violation of the federal narcotics law; (2) as a part of the continuing series of violations of federal drug laws; (3) in concert with five or more persons; (4) for whom defendant is an organizer, supervisor, or manager; and (5) from which he derives substantial income or resources.

Long contends that the government failed to prove that he acted in concert with five or more persons for whom he was an organizer, supervisor, or manager. The 6<sup>th</sup> Circuit found that proof that individuals have a buyer-seller relationship with the defendant is not sufficient to support a conviction for engaging in a CCE. Moreover, a defendant's relationship with five other people does not need to exist at the same time and the five people do not need to have relationships with one another. The Court found that evaluating the evidence in the light most favorable to the government, there was sufficient evidence to conclude that Long acted in concert with at least five individuals for whom he acted as an organizer, supervisor, or manager.

Prior to the trial, Long moved for severance because he alleged that a joint trial with Mark Ross, his former attorney and alleged co-conspirator, compromised specific trial rights and prevented the jury from making a reliable judgment. The Court found that joinder of the two defendants was not improper even though when Ross testified, he admitted his own violation of drug laws and currency reporting requirements and these admissions also implicated Long.

Next, Long argued that his conviction should be reversed because of prosecutorial misconduct that occurred at his trial. The 6<sup>th</sup> Circuit has a two-part test for determining whether prosecutorial misconduct warrants a mistrial: (1) whether the prosecutor's conduct or comments were improper and; (2) whether the impropriety amounts to reversible error either as a flagrant impropriety or because a new trial is required. In this case, the prosecutor questioned Long's wife in the following manner. A.Q. Right here and now, Mrs. Long, you are here testifying before this jury, and I am telling you right now, as far as your 5K motion is concerned, as far as any concerns about perjury or anything else, no repercussions are going to happen to you - - -.

Counsel objected and the district court sustained the objections. However, the district court denied the defendant's motions for a mistrial and no curative instruction was either requested or given. The 6<sup>th</sup> Circuit found that the question did not result in improper vouching for the credibility of Mrs. Long. In

Blanton relied on *Crane v. Kentucky*, 476 U.S.

the alternative, the Court also found that even if the question was improper, it was neither flagrant misconduct nor impropriety requiring a new trial.

*Blanton v. Elo*, C F.3d C, 1999 WL 529407 (6<sup>th</sup> Cir. 1999).

The State of Michigan theorized that Blanton killed three people because he wanted to steal their drugs and money. In contrast, Blanton offered expert testimony to prove that he acted in self-defense in the killings. Blanton's expert was of the opinion that Blanton experienced derealization in the incident. Derealization is the disruption in the perception of traumatic events as they are occurring. The trial court excluded Blanton's expert testimony about derealization because it concluded that the testimony related to a diminished capacity defense for which pretrial notice was required but not given by Blanton.

The Michigan Court of Appeals ruled that the expert's testimony did not relate to the diminished capacity defense. However, the Michigan Court of Appeals held that the trial court's ruling was harmless because the expert testimony was cumulative evidence as it mirrored Blanton's testimony on this issue. The Michigan Supreme Court denied Blanton's application for a leave to appeal and the district court dismissed Blanton's ' 2254 petition. The 6<sup>th</sup> Circuit issued a certificate of appealability on whether the trial court denied Blanton's due process and 6<sup>th</sup> Amendment rights when it ruled that his evidence of derealization was inadmissible.

Before a writ may issue under ' 2254, a federal court must find that the state court's adjudication of the claim: A(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The 6<sup>th</sup> Circuit has adopted the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be debatable among reasonable jurists, if it is so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes. In this case, the Court found that the issue was whether the state court decision involved an unreasonable application of clearly established Supreme Court precedent.

683 (1986) as the clearly established federal law that

the Michigan Courts misapplied. In *Crane*, the Court found that the Constitution guaranteed a criminal defendant a meaningful opportunity to present a complete defense.® The 6<sup>th</sup> Circuit found that Blanton's expert testimony regarding derealization was competent, reliable evidence . . . central to the defendant's claim of innocence.® However, the Court found that the conclusion of the Michigan Court of Appeals that the testimony was cumulative with Blanton's, was not unreasonable.

Therefore, the state court decision did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Therefore, the judgment of the district court was affirmed.

***United States v. Coleman*, CF.3dC, 1999 WL 547996 (6<sup>th</sup> Cir. 1999).**

This is an *en banc* decision affirming the panel decision reported at 138 F.3d 616 (6<sup>th</sup> Cir. 1999). The original decision was featured in the Volume 7 of this newsletter in May 1998.

Coleman pled guilty to selling crack to the ATF and at the time of sentencing, he filed a motion for a downward departure. In this motion, Coleman argued that his offense was committed due to the improper investigative techniques of the ATF that targeted and induced parolees to commit crimes. Moreover, Coleman also requested a downward departure based on the disparate punishment imposed on crack cocaine offenders as compared to powder cocaine offenders. The district court concluded that the Guidelines do not authorize a downward departure based on the investigative techniques employed by law enforcement officials. Moreover, the district court also found that it was not permitted to aggregate departure factors in determining whether they, in the aggregate, took the case outside of the mythical heartland.®

A divided panel of the 6<sup>th</sup> Circuit found that after *Koon v. United States*, C.U.S.C., 116 S.Ct. 2035 (1996), the district court cannot categorically exclude any non-prohibited factors from being considered in evaluating a motion for a downward departure. Therefore, the Court found that the district court erred by not considering whether the investigative techniques employed by the ATF took this case outside of the heartland. Moreover, the Court also found that the powder-crack cocaine ratio, by itself, was not enough to take the case outside the Guideline heartland. However, the Court found that the district court erred by not considering all of Coleman's alleged departure factors, in the aggregate, in evaluating his motion for a downward departure.

In this *en banc* decision, the divided court

affirmed the panel's decision that was originally filed. The government argued that there was no basis for a downward departure based on the investigative techniques employed by law-enforcement. The Court rejected this proposition and found that a downward departure is permitted when there is a mitigating factor that has not been adequately considered in formulating the Guidelines. If a factor is unmentioned in the Guidelines, the district court must, after considering the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole, decide whether it is sufficient to take the case out of the Guidelines heartland.®

If the factor has not been proscribed, the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable guideline.® Thus the majority held that there are an unquantifiable number of potential departure factors, including heretofore unknown factors that have not been previously considered by a court.® Simply because a court has not directly ruled on the factor at issue does not excuse the district court from considering the factor as a potential basis for a downward departure.®

The majority found that improper investigative techniques, as a basis for a downward departure, is not a factor considered by the Guidelines. Therefore, the district court was required to examine the structure and theory of the relevant guideline, and the Guidelines as a whole, to determine whether the grounds proffered by Coleman made the case sufficiently atypical to remove it from the heartland.

The government also argued that in making the determination that a downward departure is warranted, one or more of the statutory sentencing goals (deterrence, incapacitation, rehabilitation, and correction) must be implicated. However, the majority rejected this argument and concluded that this argument was a narrow application of the downward departure mechanism.®

Finally, the majority also held that even if the factors independently do not take the case outside of the heartland, the district court is authorized to examine the combination or aggregation of factors in determining whether Coleman's case was outside the heartland of crack cases.

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